SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 45

WILLIAM C. LINN, PETITIONER,

vs.

UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 114, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JULY 28, 1965

[fol. A]

No. 15,548

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WILLIAM C. LINN, Plaintiff-Appellant,

v.

UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 114, a labor association, LEO J. DOYLE, BENTON I. BILBREY and W. T. ENGLAND, jointly and severally, Defendants-Appellees.

Appeal from the District Court of the United States for the Eastern District of Michigan, Southern Division.

[File endorsement omitted]

[fol. 1]

Appendix for Appellant—Filed November 18, 1963

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 23331

WILLIAM C. LINN, Plaintiff-Appellant,

v.

UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 114, a labor association, LEO J. DOYLE, BENTON I. BILBREY and W. T. ENGLAND, jointly and severally, Defendants-Appellees.

RELEVANT DOCKET ENTRIES

1962		
Dec.	17	Libel filed—summons issued.
1963		
Jan.	7	Appearance of United Plant Guard, Local 114, Benton I. Bilbrey & W. T. England filed.
"	"	Answer of Deft. Leo J. Doyle filed.
"	"	Defts. United Plant Guard Workers, Benton I. Bilbrey & W. T. England Motion to dismiss filed. Hearing Jan. 21/63.
"	28	Affidavit of Benton I. Bilbrey filed.
"	"	Motion to dismiss heard and taken under advisement with briefs to be filed.
June	5	Memorandum of opinion granting defts' motion to dismiss filed and entered.
"	7	Amended complaint filed.
"	20	Order granting motion to dismiss of defts. United Plant Guard Workers of America, Benton I. Bilbrey and W. T. England, for lack of jurisdiction, filed and entered.

[fol. 2]

July	19	Notice of appeal filed.
*Aug.	19	Brief in opposition to motion to dismiss filed.
* "	"	Answer to ptf's brief in opposition to motion to dismiss filed.
* "	"	Memorandum of points and authorities in support of motion to dismiss filed.
* "	"	Affidavit of Benton I. Bilbrey, filed.

*The chronology of these docket entries, as they appear here, may be misleading. In actual fact, these starred documents were submitted to the Court in the following sequence:

(footnote continued)

a) Memorandum of Points and Authorities in Support of Motion to Dismiss, filed with the Court on January 28, 1963.

b) Brief in Opposition to Motion to Dismiss filed with the Court on March 13, 1963.

c) Answer to Plaintiff's Brief in Opposition to Motion to Dismiss, filed with the Court on May 7, 1963.

d) Affidavit of Benton I. Bilbrey, dated April 30, 1963, attached to Answer to Plaintiff's Brief in Opposition, filed with the Court on May 7, 1963.

These documents and papers were held by the Court in its personal file, and not inserted in the official Court file until request was made therefor on August 19, 1963. Thus, the "filing date" follows the actual date of submission of these documents to the Court by several months in each of these instances.

[fol. 3]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

COMPLAINT—Filed December 17, 1962

Count I

Now comes William C. Linn plaintiff herein, by and through his attorneys, Welday, O'Leary & Goldstone, and complains of United Plant Guard Workers of America, Local 114, a labor association, Leo J. Doyle, Benton I. Bilbrey, and W. T. England, jointly and severally, defendants herein, and says,

1. Plaintiff is a resident of the State of Ohio, and the defendants United Plant Guard Workers of America, Local 114, a labor association, Leo J. Doyle, Benton I. Bilbrey, and W. T. England are residents of the State of Michigan. The matter in controversy exceeds, exclusively of interest and costs, the sum of Ten Thousand ($10,000.00) Dollars.

2. That plaintiff is now and has been for years past employed by Pinkerton's National Detective Agency, Inc., as an Assistant General Manager for the North Central Region. In such capacity, plaintiff has supervisory control over Agency offices in the cities of Minneapolis, Minnesota; Milwaukee, Wisconsin; Chicago, Illinois; Detroit, Michigan; and Toledo, Columbus, and Cleveland, Ohio.

3. That defendant United Plant Guard Workers of America, Local 114 is a labor association maintaining offices at 13722 Linwood, Detroit, Michigan. Defendant Benton I. Bilbrey is and has been during the time of the actions complained of herein, President of said Local 114. Defendant W. T. England is and has been during the time of the actions complained of herein Vice-President of said [fol. 4] Local 114. Defendant Leo J. Doyle was during the time of the actions complained of herein, employed by plaintiff's employer as a guard.

4. That from on or about October 1962 up to and including on or about December 7, 1962, at Detroit, Michigan, the defendants herein did unlawfully, wantonly and maliciously conspire, confederate and agree among and with each other and others whose names are presently unknown to plaintiff to libel and defame plaintiff.

5. That during the times aforesaid, defendants did conspire to maliciously publish of and concerning plaintiff, by mailing and/or circulating among some or all of plaintiff's employees the following hand printed false and defamatory matter:

"(7) Now we find out that Pinkerton's has had a large volume of work in Saginaw they have had it for years.

United Plant Guard Workers now has evidence

A. That Pinkerton has 10 jobs in Saginaw, Michigan.

B. Employing 52 men.

C. Some of these jobs are 10 yrs. old!

(8) Make you feel kind sick & foolish.

(9) The men in Saginaw were deprived of their *right* to VOTE in three N. L. R. B. elections. Their names were not summitted (sic). These guards were voted into the Union in 1959! These Pinkerton guards were *robbed* of pay increases. The Pinkerton manegers (sic) were LYING to us—all the time the contract was in effect.

[fol. 5] No doubt the Saginaw men will file criminal charges.

Somebody may go to Jail!"

6. That plaintiff is and was one of the managers referred to by defendants.

7. That thereby defendants meant and intended to mean and intended for the readers thereof to understand that plaintiff had deliberately lied to part or all of Pinkerton plant guard employees; that plaintiff had lied and/or deliberately falsified information required of him to be submitted to the National Labor Relations Board; that plaintiff had lied to or deliberately misled Pinkerton employees concerning a prior Union contract; that plaintiff had deliberately withheld from Pinkerton employees wages earned through pay increases; that plaintiff had committed certain criminal acts for which he would be prosecuted.

8. That the said words and material are and were wholly false, defamatory and untrue all of which was known to defendants.

9. That the said false and defamatory words and material are libelous per se.

Count II

1. Plaintiff realleges all those allegations contained in paragraphs 1 through 3 of Count I hereof, and said Counts are restated and incorporated hereunder by reference thereto.

2. That on or about December 7, 1962, at Detroit, Michigan, the defendants herein did wilfully and maliciously pub-

[fol. 6] lish and caused to be published of and concerning the plaintiff, by mailing to one Arthur Bottini, 721 Casgrain, Detroit, Michigan, the following hand printed false and defamatory matter:

"(7) Now we find out that Pinkerton's has had a large volume of work in Saginaw they have had it for years.

United Plant Guard Workers now has evidence

A. That Pinkerton has 10 jobs in Saginaw, Michigan.

B. Employing 52 men.

C. Some of these jobs are 10 yrs. old!

(8) Make you feel kind sick & foolish.

(9) The men in Saginaw were deprived of their *right* to VOTE in three N. L. R. B. elections. Their names were not summitted (sic). These guards were voted into the Union in 1959! These Pinkerton guards were *robbed* of pay increases. The Pinkerton managers (sic) were LYING to us—all the time the contract was in effect.

No doubt the Saginaw men will file criminal charges.

Somebody may go to Jail!"

3. That plaintiff herein is specifically named elsewhere in the publication as one of the managers referred to in the words and material quoted immediately above.

4. That thereby defendants meant and intended to mean [fol. 7] and were understood by the reader and/or readers of said false and defamatory material as meaning that plaintiff had deliberately lied to part or all of Pinkerton plant guard employees, that plaintiff had lied and/or deliberately falsified information required of him to be submitted to the National Labor Relations Board, that plaintiff had lied to or deliberately misled Pinkerton employees concerning the union contract, that plaintiff had deliberately withheld wages earned through automatic pay increases

from Pinkerton employees, that plaintiff had committed certain criminal acts for which he would be prosecuted.

5. That the said words and material are wholly false.

6. That the said false and defamatory words and material are libelous per se.

Wherefore, plaintiff demands judgment against the defendants herein jointly and severally in the amount of Five Hundred Thousand and no/100 ($500,000.00) Dollars, together with costs and attorney fees so most wrongfully sustained.

Welday, O'Leary & Goldstone, By Donald F. Welday, Jr., 1180 First National Building, Detroit 26, Michigan, WOodward .....

[fol. 8]

ENTRY OF APPEARANCE—Filed January 7, 1963

Notice of Appearance (omitted in printing).

[fol. 9]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

MOTION TO DISMISS COMPLAINT—Filed January 7, 1963

Defendants, United Plant Guard Workers of America, Local 114, Benton I. Bilbrey and W. T. England, through their attorneys, Livingston, Ross & Van Lopik, move the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendants upon which relief can be granted.

2. To dismiss the action on the ground that the Court lacks jurisdiction because the amount actually in controversy is less than $10,000.00, exclusive of interests and costs and the requisite diversity of citizenship is not alleged.

3. To dismiss the action because this Court lacks jurisdiction over the subject matter. The subject matter of both counts of the complaint involve matters relating to the self organization rights and concerted activities of employees under the Labor Management Relations Act of 1947, as amended, 29 U.S.C. Sec. 151, et seq. All of the conduct complained of in both counts of said complaint is arguably protected by Section 7 of said statute, or prohibited by Section 8, and is within the exclusive jurisdiction of the National Labor Relations Board.

This motion is based upon the files and records in this cause and the affidavit of Benton I. Bilbrey hereto attached.

Dated: January 7, 1963.

Livingston, Ross & Van Lopik, By Winston L. Livingston, Attorneys for Defendants, 2144 First National Building, Detroit 26, Michigan, WOodward 2-4620.

[fol. 10]

ATTACHMENT TO MOTION

AFFIDAVIT OF BENTON I. BILBREY

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

BENTON I. BILBREY, being first duly sworn, deposes and says:

1. That he is the duly elected and acting President of defendant, United Plant Guard Workers of America Local 114 (hereinafter referred to as "Local 114"), and has served continuously in said capacity since the year 1957.

2. That on or about December 13, 1962, an unfair labor practice charge against Local 114, previously filed with the National Labor Relations Board, was served on said Local Union. The unfair labor practice charge was filed by Pinkerton's National Detective Agency, Inc. with the Detroit Regional Office of the National Labor Relations Board on

December 11, 1962. A true copy of said charge and a covering letter from Thomas Roumell, Regional Director of NLRB, is attached hereto.

3. That on or about December 14, 1962 he received a letter from an attorney of the National Labor Relations Board requesting certain information concerning the substance of the unfair labor practice charge. A true copy of said letter is attached.

4. That on Monday, December 17, 1962 he was interviewed at length by the NLRB attorney, Russell E. Price, about the subject matter of the unfair labor practice charge.

A true copy of a sworn affidavit given to said attorney [fol. 11] and filed with the Regional Office of the National Labor Relations Board on December 18, 1962 is attached hereto.

5. Said NLRB attorney also interviewed defendant, Leo J. Doyle, on the afternoon of December 17, 1962. Mr. Doyle also submitted a sworn affidavit to the National Labor Relations Board.

6. Although affiant had no knowledge of the alleged hand-printed matter referred to in the complaint prior to the service of the unfair labor practice charge upon Local 114 on or about December 13, 1962, said Local Union has been engaged in an organizational drive among the employees of plaintiff's employer in the Detroit area since around the first of November, 1962.

Further affiant sayeth not.

/s/ Benton I. Bilbrey
Benton I. Bilbrey

Subscribed and sworn to before me
this 7th day of January, 1963.

/s/ Ellen L. Hillstrom
Ellen L. Hillstrom
Notary Public, Wayne County,
Michigan
My Commission Expires March 29, 1964.

[fol. 12]

ATTACHMENT TO AFFIDAVIT OF BENTON I. BILBREY

NATIONAL LABOR RELATIONS BOARD

Seventh Region

500 Book Building, Detroit 26, Michigan

7-54

Rev. 5-3-62

Telephone: WOodward 3-9330

December 12, 1962

United Plant Guard Workers of America, Ind.
Local 114
13722 Linwood
Detroit, Michigan

Re: United Plant Guard Workers of America, Ind., Local 114 (Pinkerton's National Detective Agency, Inc.)

Case No. 7-CB-1008

Gentlemen:

A charge has been filed with this office alleging that you have engaged and are engaging in unfair labor practices within the meaning of the National Labor Relations Act, as amended. A copy of the charge is herewith served upon you. Also attached is a copy of Form NLRB 4541, pertaining to our investigative and voluntary adjustment procedures.

We would appreciate receiving from you promptly a full and complete written account of the facts and a statement of your position in respect to the allegations set forth in the charge.

This case has been assigned to Russell Price, Ext. 251, who will contact you soon. Should you so desire, you are invited to contact him concerning this matter without waiting to hear from him. Please cooperate with him so that all facts of the case may be considered.

Very truly yours,

/s/ THOMAS ROUMELL
Thomas Roumell
Regional Director

Enclosures—2
REGISTERED MAIL

[fol. 13]

NLRB Form 508 entitled "Charge Against Labor Organization or Its Agents"

(See Opposite ☞)

FORM NLRB-508
(2-60)

Form Approved
Budget Bureau No. 64-R003.11

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: *File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.*

DO NOT WRITE IN THIS SPACE

CASE NO. 7-CB-1008

DATE FILED 12-11-62

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

NAME

UNITED PLANT GUARD WORKERS OF AMERICA (IND.) LOCAL 114

ADDRESS

13722 Linwood, Detroit, Michigan

THE ABOVE-NAMED ORGANIZATION(S) OR ITS AGENTS HAS (HAVE) ENGAGED IN AND IS (ARE) ENGAGING IN UNFAIR LABOR PRACTICES WITHIN THE MEANING OF SECTION 8(b) SUBSECTION(S) (1) (A) (List subsections) OF THE NATIONAL LABOR RELATIONS ACT, AND THESE UNFAIR LABOR PRACTICES ARE UNFAIR LABOR PRACTICES AFFECTING COMMERCE WITHIN THE MEANING OF THE ACT.

2. BASIS OF THE CHARGE (*Be specific as to facts, names, addresses, plants involved, dates, places, etc.*)

The above-named labor organization, by its officers, agents, representatives or employees has since on or about December 7, 1962, restrained and coerced employees of the Pinkerton's National Detective Agency, Inc. in the exercise of the rights guaranteed in Section 7 of the Act, by publishing and distributing to the employees of the undersigned employer scurrilous, libelous and false material relating to the representation of those employees by the above-named union.

By the above and other acts not specifically set forth herein, the above-named labor organization has interfered with, restrained and coerced and is interfering with, restraining and coercing those employees in the exercise of the rights guaranteed to them in Section 7 of the Act.

3. NAME OF EMPLOYER

PINKERTON'S NATIONAL DETECTIVE AGENCY, INC.

4. LOCATION OF PLANT INVOLVED (*Street, City, and State*)

2111 Woodward Ave., Room 707, Detroit 1, Michigan

5. TYPE OF ESTABLISHMENT (*Factory, mine, wholesaler, etc.*)	6. IDENTIFY PRINCIPAL PRODUCT OR SERVICE	7. NO. OF WORKERS EMPLOYED
Security Service	Guard Service	60

8. FULL NAME OF PARTY FILING CHARGE

Pinkerton's National Detective Agency, Inc.

9. ADDRESS OF PARTY FILING CHARGE (*Street, City, and State*)	10. TEL. NO.
2111 Woodward Ave.; Room 707, Detroit 1, Michigan	WO. 1-2924

11. DECLARATION

I DECLARE THAT I HAVE READ THE ABOVE CHARGE AND THAT THE STATEMENTS THEREIN ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

BY /s/ Peter B. Cross
(Signature of representative or person making charge)

December 11, 1962
(Date)

Manager
(Title or office, if any)

WILFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U. S. CODE, TITLE 18, SECTION 1001)

GPO 888953

[fol. 14]

ATTACHMENT TO AFFIDAVIT OF BENTON I. BILBREY

NATIONAL LABOR RELATIONS BOARD

Seventh Region

500 Book Building, Detroit 26, Michigan

Telephone: WOodward 3-9330

December 13, 1962

United Plant Guard Workers of
America (Ind.), Local 114
13722 Linwood
Detroit 38, Michigan

Attn: Benton I. Bilbrey, President

Re: United Plant Guard Workers of
America (Ind.), Local 114
(Pinkerton's National Detective
Agency, Inc.)

Case No. 7-CB-1008

Gentlemen:

Please submit to the undersigned the Union's position concerning the Employer's charge that the pamphlets distributed to the employees of Pinkerton's National Detective Agency, Inc., were false.

Would you arrange for any witnesses the Union wishes to present to be preapred to give their testimony at the earliest time that is mutually convenient in regard to the specific charges of the Employer.

In addition, please submit to the undersigned copies of the pamphlets distributed to the above-mentioned employees by the Union.

Thank you for your cooperation in this matter.

Very truly yours,

/s/ RUSSELL E. PRICE
Russell E. Price
Attorney

[fol. 15]

ATTACHMENT TO AFFIDAVIT

AFFIDAVIT OF BENTON I. BILBREY

COUNTY OF WAYNE)
) SS
STATE OF MICHIGAN)

AFFIDAVIT

I, BENTON I. BILBREY, being first duly sworn, upon my oath affirm and say:

I am 46 years of age and reside at 11831 Beaconsfield Avenue, in the Town/City of Detroit, County of Wayne, State of Michigan.

My telephone number is TO. 8-9045. My social security number is 366-10-3667.

I have been employed at U. P. G. W. A. Local 114, located at 13722 Linwood Avenue, Detroit, Michigan, since 1957. My job classification is President.

The following statement is given in reference to five pamphlets allegedly distributed by me as an officer of Local Union 114, U. P. G. W. A. These five pamphlets are identified as one sheet of paper dated December 7, 1962, consisting of seventeen hand printed lines. A second pamphlet of a single sheet hand printed entitled "To All Pinkerton Guards", consisting of twenty-two hand printed lines signed by Leo J. Doyle, former Chairman. A third pamphlet consisting of three pages of hand printed lines containing ten numbered paragraphs entitled "To Full Time Guards—Only Eighteen Left". A fourth pamphlet entitled "Everybody Knows About the Mobil Oil Job", consisting of one page of hand printed lines and containing a newspaper article.

As indicated by the name on the second pamphlet, Leo J. [fol. 16] Doyle, Former Chairman, even though his name does appear on such pamphlet, he is not a member of our Local Union, nor an agent of our union, nor an employee of our Union.

Our official Union record indicates that Leo J. Doyle withdrew from our Union effective March 5, 1962, and a transfer or withdrawal certificate was executed on that date. Further, the Union file contains a dues card for Leo J. Doyle which indicates that he last paid dues for the month of December, 1961, and such dues were paid January 26, 1962. These records cannot be reproduced but I have shown such records to the Labor Board Investigator.

These above described pamphlets were not prepared nor issued by me, nor any officer under my direction in Local Union 114, U. P. G. W. A. My first knowledge of these pamphlets came on December 13, 1962, when unfair labor practice charges were served upon the Union by Registered Mail.

Furthermore, I would not hand out any material from this Union that was not properly signed by me as an officer, or was not signed by another officer of this Union with my approval. I feel that would add dignity to the composition of any material to have it signed by me as an officer of Local 114.

In addition, I would have this done properly by my office staff and with the use of office equipment. I would not draft up something and permit it to be circulated in the form in which these pamphlets were.

Furthermore, I would have the material definitely checked out accurately. I would not use a specific figure as $30,240.00 [fol. 17] profits as contained in pamphlet No. 4. I know from my experience that I would take the precaution to stating approximately so much money profits. I would not put out the unqualified figures such as was done in pamphlet No. 4.

Finally, the items in pamphlets No. 1 and No. 2, pertaining to picketing would never be sent out of my Local Union because under the International Constitution, Article 36, we would not be permitted to threaten picketing. There is a constitutional procedure which provides that the International President and/or the International Executive Board approval must be given before any strike. This provision is also practiced in regard to demonstrations. I, as President of a Local of this International would not attempt on my

own authority to institute a demonstration or picketing or striking without the International sanction.

The fact that the threats of picketing were contained in these pamphlets indicates that I had nothing to do with these pamphlets and further that whoever did prepare these pamphlets was ignorant of the Constitution.

In the event that it was not clear from anything I have said above, not only did I have nothing to do with the preparation of these pamphlets but I had no knowledge of who did prepare them, nor any knowledge that they were being prepared and sent out until I was served with the NLRB charge accusing me of being responsible for such pamphlets.

I hereby certify that I have read the above and fully [fol. 18] understand the contents of the above three (3) pages typewritten and I certify that they are true and correct to the best of my knowledge and belief.

/s/ Benton I. Bilbrey

Subscribed and sworn to before me
this 18th day of December, 1962
at Detroit, Michigan

/s/ Russell E. Price

[fol. 19]

In the United States District Court
For the Eastern District of Michigan

Memorandum of Points and Authorities in Support of Motion to Dismiss—Filed August 19, 1963

I.

The Failure to Allege Diversity of Citizenship Deprives this Court of Jurisdiction.

Douglas vs. UE (U. S. D. C. Ed. Mich.), 127 F. Supp. 795.

Murphy vs. Hotel Employees Union, 102 F. Supp. 488.

II.

The Amount in Controversy Does Not Exceed Ten Thousand Dollars.

As appears on the face of the pleadings, the ad damnum is not made in good faith. *Moore's Federal Practice,* Sec. 0.93.

The burden of proving jurisdictional prerequisites rests upon plaintiff. *Moore's Federal Practice,* Sec. 0.92 (3-1).

III.

The Subject Matter of a Complaint is Within the Exclusive Jurisdiction of the National Labor Relations Board.

San Diego Building Trades vs. Garmon, 359 U. S. 236

Local 438, Laborers vs. Curry (decided Jan. 21, 1963), —— U. S. ——, 52 LRRM 2188.

In *San Diego Building Trades vs. Garmon,* supra, the Supreme Court laid down the following test for determining jurisdiction:

> [fol. 20] "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by Sec. 7 of the Taft-Hartley Act, or constitute an unfair labor practice under Sec. 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regula-

tion would create potential frustration of national purposes."

The decision makes clear the secondary role to be played by courts:

"At times it has not been clear whether the particular activity regulated by the States was governed by Sec. 7 or Sec. 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board."

The finality of NLRB action on a dispute and the foreclosure of further court proceedings thereon was emphasized by Justice Frankfurter as follows:

"It is not for us to decide whether the National Labor Relations Board would have, or should have, decided these questions in the same manner. When an activity is arguable subject to Sec. 7 or Sec. 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

[fol. 21] "To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by Sec. 7, or prohibited by Sec. 8, then the matter is at an end, and the States are ousted of all jurisdiction."

In the recent case of *Local 438, Laborers vs. Curry*, supra, the court re-affirmed *Garmon*:

"The allegations of the complaint, as well as the findings of the Georgia Supreme Court, made out at least an arguable violation of Sec. 8(b) of the National Labor Relations Act, 29 U. S. C. Sec. 158(b). Consequently, the state court had no jurisdiction to issue an injunction or to adjudicate this controversy, which lay within the exclusive powers of the National Labor Relations Board."

In the instant case, plaintiffs have invoked the jurisdiction of NLRB on the very matter which is the subject of this suit. The Regional Director of the National Labor Relations Board has made a determination on the merits and plaintiff has appealed to Washington. The matter is under the control and consideration of the National Labor Relations Board.

Respectfully submitted,

Livingston, Ross & Van Lopik, By: Winston L. Livingston, Attorneys for Defendants, UPGWA, Local 114, Benton I. Bilbrey and W. T. England, 2144 First National Building, Detroit 26, Michigan, WOodward 2-4620.

Dated: January 28, 1963.

[fol. 22]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

AFFIDAVIT OF BENTON I. BILBREY—Filed August 19, 1963

State of Michigan,
County of Wayne, ss.

Benton I. Bilbrey, being first duly sworn, deposes and says:

1. That he is the duly elected and acting President of Local 114, United Plant Guard Workers of America, (here-

inafter referred to as "Local 114"), and has served continuously in said capacity since the year 1957.

2. That he has heretofore made an affidavit in this matter on January 7, 1963.

3. That on or about January 7, 1963, he received a letter from Jerome H. Brooks, Acting Regional Director, Seventh Region, National Labor Relations Board, dismissing the unfair labor practice charges filed in Case No. 7-CB-1008. A true copy of said letter is attached hereto.

4. That on or about January 23, 1963, he received a copy of a letter from the Office of the General Counsel of the National Labor Relations Board, addressed to Mr. Donald F. Welday, Jr., attorney for plaintiff, Pinkerton's National Detective Agency, Inc. A true copy of said letter is attached hereto.

Further deponent sayeth not.

Benton I. Bilbrey.

Subscribed and sworn to before me this 28th day of January, 1963.

Ellen L. Hillstrom, Notary Public, Wayne County, Mich., My Commission expires March 29, 1964.

[fol. 23]

ATTACHMENT TO AFFIDAVIT OF BENTON I. BILBREY

NATIONAL LABOR RELATIONS BOARD

Seventh Region

500 Book Building, Detroit 26, Michigan

Telephone 226-3200

January 7, 1963

Pinkerton National Detective Agency, Inc.
2111 Woodward Avenue
Room 707
Detroit 1, Michigan

Re: United Plant Guard Workers of America, Local 114
(Pinkerton National Detective Agency, Inc.)
Case No. 7-CB-1008

Gentlemen:

The above-captioned case charging violations under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it appears there is insufficient evidence of violation, and accordingly further proceedings are not warranted at this time. I am, therefore, refusing to issue complaint in this matter. The basis for refusing to proceed in this matter is as follows:

The above-mentioned charge against United Plant Guard Workers of America, Local 114, was based upon four allegedly objectionable leaflets prepared and circulated by an employee of your company. Such employee was not an officer or member of the charged union, nor was there any evidence that he was acting as an agent of such union. There is no evidence that the union was involved in any respect in the drafting [fol. 24] and circulation of the leaflets. In view of the

fact that the union is not responsible for the distribution of said leaflets, the charge against the union is wholly without basis.

Pursuant to the National Labor Relations Board Rules and Regulations (Section 102.19), you may obtain a review of this action by filing a request for such review with the General Counsel of the National Labor Relations Board, Washington 25, D. C., and a copy with me. This request must contain a complete statement setting forth the facts and reasons upon which it is based. The request must be received by the General Counsel in Washington, D. C., by the close of business on January 21, 1963. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file.

Very truly yours,

Jerome H. Brooks
Acting Regional Director

cc: General Counsel
National Labor Relations Board
Washington 25, D. C.

Statistical Analysis Branch

United Plant Guard Workers of
America, Local 114
13722 Linwood Avenue
Detroit 38, Michigan

Welday, O'Leary & Goldstone
1180 First National Building
Detroit 26, Michigan

Attn: Donald F. Welday, Jr., Esq.

[fol. 25]

ATTACHMENT TO AFFIDAVIT OF BENTON I. BILBREY

NATIONAL LABOR RELATIONS BOARD

Office of the General Counsel

Washington 25, D. C.

January 22, 1963

Re: United Plant Guard Workers of America, Local 114 (Pinkerton National Detective Agency, Inc.) Case No. 7-CB-1008

Mr. Donald F. Welday, Jr.
Attorney at Law
Welday, O'Leary & Goldstone
1180 First National Building
Detroit 26, Michigan

Dear Mr. Welday:

This is to acknowledge receipt of your request for review of the Regional Director's refusal to issue complaint in the above matter. With respect to your request for an extension of time, you are hereby granted until January 31, 1963, to file any additional information you desire in support of your appeal. Please furnish the Regional Director with a copy.

Please be assured your request will receive careful consideration and you will be advised, as soon as possible, after January 31, when a decision has been reached.

Very truly yours,

Stuart Rothman
General Counsel

By /s/ IRVING M. HERMAN
Director, Office of Appeals

cc: Director, 7th Region

Pinkerton National Detective Agency, Inc., 2111 Woodward Ave., Room 707, Detroit 1, Michigan

United Plant Guard Workers of America, Local 114, 13722 Linwood Avenue, Detroit 38, Michigan

---

[fol. 26]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS—
Filed August 19, 1963

Plaintiffs in the above entitled consolidated actions, by and through their attorneys, Welday, O'Leary & Goldstone, herewith submit to the Court, pursuant to its request, their Brief in opposition to the Motions to Dismiss heretofore filed by defendant union and defendants Bilbrey and England. It is plaintiff's understanding that the question presented is as follows:

> May plaintiffs maintain their respective actions for damages as a result of alleged libel on the part of defendants, or, has Congress given exclusive jurisdiction of the type of matters here presented to the National Labor Relations Board?

I

Defendants Union, Bilbrey and England (hereinafter called defendants) have moved the Court to dismiss the pending actions "because this Court lacks jurisdiction over the subject matter. The subject matter of both counts of the complaint(s) involve matters relating to the self organization rights and concerted activities of employees under the Labor Management Relations Act of 1947, as amended, 29 U. S. C. 151 et seq. All of the conduct complained of in both counts of said complaint is arguably protected by Section 7 of said statute, or prohibited by Section 8, and is within the exclusive jurisdiction of the National

Labor Relations Board." (para. 3, Defendants Motion to Dismiss)

Plaintiffs maintain that while the proposition stated is a true statement of the law, in the abstract, it does not apply [fol. 27] to the instant situation.

II

The situation presented would seem to be controlled by two cases of the United States Supreme Court, to wit: *United Construction Workers vs. Laburnum Construction Co.*, (1954) 347 US 656, and *San Diego Unions vs. Gorman* (1959) 359 US 236.

(a)

In *Laburnum,* the Company sued the union in tort for compensatory and punitive damages. The Company was performing certain construction work it had under contract when Union representatives appeared upon the scene and demanded that the Company's employees join their union. Upon refusal to yield to these demands, Union agents threatened and intimidated the Company's employees with such violence that the Company was forced to abandon its work. The Union was ultimately found liable for compensatory damages in the amount of $100,000.00, by the State Courts of Virginia.

Upon Appeal to the U. S. Supreme Court, the issue was limited to the exclusiveness of the jurisdiction of the National Labor Relations Board (hereinafter called N. L. R. B.) in a common law tort action based on this conduct.

The Supreme Court assumed "the conduct before us also constituted an unfair labor practice" within Sec. 8 of the Labor Management Relations Act (L. M. R. A.). (660, 661). The court held:

> "Here Congress has neither provided nor suggested any substitute for the traditional state court procedure [fol. 28] for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent (i.e., the Company) from this right of recovery

will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners (the Union) immunity from liability for their tortious conduct." (663, 664) and at page 669, the Court said:

> "If petitioners were unorganized private persons, conducting themselves as petitioner did here, Virginia would have had undoubted jurisdiction of this action against them. The fact that petitioners are labor organizations, with no contractual relationship with respondent or its employees, provides no reasonable basis for a different conclusion."

(b)

The *Gorman* case has, concededly, made a serious inroad upon the *Laburnum* holding, and *Gorman* is the controlling law today.

Gorman limits *Laburnum* to a holding that State jurisdiction may prevail in a situation where there is a compelling state interest in the maintenance of domestic peace, not overridden by *clearly expressed Congressional direction.*

Gorman sought an injunction and damages against the Union in the California State Courts based upon the [fol. 29] Union's peaceful picketing of Gorman's place of business. Ultimately, Gorman was denied the injunctive relief sought, but was allowed damages ($1,000.00) by the California Supreme Court.

The United States Supreme Court reversed saying (at p. 245):

> "When an activity is arguably subject to s. 7 or s. 8 of the Act, the States as well as the Federal Courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."

and went on to say (at page 247)

> "It is true that we have allowed the States to grant compensation for the consequences, as defined by the

> traditional law of torts, of conduct marked by violence and imminent threats to the public order."

but (at page 248)

> "In the present case there is no such compelling state interest."

(c)

In the instant case before the Court, there is a compelling state interest. For, if the allegations in plaintiff's Bill are correct, defendants committed not only a tort but also a *crime.*

The appropriate Michigan Statute recites:

> "Any person who shall falsely and maliciously, by word, writing, sign or otherwise accuse, attribute, or impute to another the commission of any crime, felony [fol. 30] or misdemeanor, or any infamous or degrading act . . . shall be guilty of a misdemeanor." MSA 28.602

Plaintiffs do not concede that the *Gorman* case has prohibited an action where the tortious conduct complained of is also criminal under the laws of the State. Similarly, plaintiffs suggest that nothing in the L. M. R. A. condones (protects) libel nor is it specifically prohibited, hence there is here an "absence of clearly expressed congressional direction" (359 U. S. at 247) to invade traditional state jurisdiction in intentional-tort situations.

Plaintiff Pinkerton urges that defendants' motion be denied.

III

Plaintiffs herein assume that if there is any merit at all to defendants' motion and argument, it would relate only to plaintiff corporation (as the employer). Surely, there is nothing in the law which would bar plaintiff Linn, *a private citizen* from maintaining his action for libel against these defendants.

Linn is not the "employer" in this matter, but simply an employee (albeit, in a managerial position). There is absolutely nothing in any of the cited cases (or any case relying thereon) which would indicate that one in Linn's position is barred from maintaining an action such as involved herein.

[fol. 31] Conclusion

Plaintiffs in both of these consolidated cases submit that the respective motions to dismiss be denied.

Respectfully submitted,

Welday, O'Leary & Goldstone, By Donald F. Welday, Jr., Attorneys for Plaintiff, 1180 First National Building, Detroit 26, Michigan, WOodward 5-5110.

[fol. 32]

In United States District Court
For the Eastern District of Michigan

Answer to Plaintiffs' Brief in Opposition to Motion to Dismiss—Filed August 19, 1963

Motions to dismiss both of the above causes based upon several grounds were filed by defendants herein. At the close of oral arguments on the motions, counsel for plaintiffs was questioned by the Court as to plaintiffs' right to seek relief in two forums at the same time. Plaintiffs were granted permission to file a brief in answer to this question. However, the brief filed does not purport to answer this question, but instead discusses the jurisdiction of this Court. And, an examination of the two cases cited by plaintiffs clearly shows that this Court lacks jurisdiction over the subject matter of these actions.

Plaintiffs state the general rule enunciated in *San Diego Building Trades vs. Garmon,* 359 U. S. 236 (1959):

"When an activity is arguably subject to Section 7 or Section 8 of the Act, the States as well as the federal

> courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."

Plaintiffs seek to avoid the rule by relying on the exception also stated in the *Garmon* case:

> "It is true that we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order . . . We have also allowed the States to enjoin such conduct . . . State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction."

[fol. 33] Plaintiffs claim that the present cases involve a "compelling state interest" because the conduct complained of is criminal under the laws of the State as well as tortious. It is also claimed this "compelling state interest" is not overridden by clearly expressed congressional direction.

The "compelling state interest" referred to in the *Garmon* case is the State's interest "in the maintenance of domestic peace," the State's right to prevent "conduct marked by violence and imminent threats to the public order." A libelous statement could not fall within this exception.

Moreover, the fact that the conduct alleged may also be criminal is immaterial. Criminal sanctions are readily available to the State. In *Local 438, Laborers vs. Curry* (decided January 21, 1963), —— U. S. ——, 52 LRRM 2188, the United States Supreme Court reaffirmed *Garmon* in a situation involving conduct which might also have been a violation of the criminal laws of Georgia.

The fact that the corporate plaintiff filed an unfair labor practice charge alleging facts similar to those involved in the instant cases, which were subsequently commenced, and the facts regarding the disposition of this charge illustrate

the potential conflict if this Court retains jurisdiction of these actions.

Affidavits previously filed herein, dated January 7 and January 28, 1963, show that the Acting Regional Director refused to issue a complaint on the charge because there was no evidence that the Union was responsible for the distribution of the material complained of and that the employer [fol. 34] requested a review of this action by the General Counsel of the National Labor Relations Board. The Acting Regional Director stated that:

> "The basis for refusing to proceed in this matter is as follows:
>
> "The above-mentioned charge against United Plant Guard Workers of America, Local 114, was based upon four allegedly objectionable leaflets prepared and circulated by an employee of your company. Such employee was not an officer or member of the charged union, nor was there any evidence that he was acting as an agent of such union. There is no evidence that the union was involved in any respect in the drafting and circulation of the leaflets. In view of the fact that the union is not responsible for the distribution of said leaflets, the charge against the union is wholly without basis."

The affidavit attached hereto shows that the Office of the General Counsel sustained the ruling of the Regional Director. These determinations were made after careful investigation by an administrative agency "armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." (*San Diego Building Trades Council vs. Garmon*, supra).

Where an activity is *arguably* subject to Section 7 or Section 8 of the Act, the courts must defer to the exclusive jurisdiction of the Board. Certainly, where, as here, the Board has asserted jurisdiction, made an investigation and final determination, the exclusive jurisdiction of the Board must be sustained to avoid conflicting determinations and

subversion of the national policy of uniformity and consistent standards of law and remedies.

[fol. 35] The individual plaintiff Linn is not specifically named in the material complained of in either action. The conduct alleged affects him solely in his capacity as manager of the corporate plaintiff. Linn, as an admitted agent of the corporate plaintiff, is an "employer" as that term is defined in Section 2(2) of the Labor Management Relations Act (29 U. S. C. A. Sec. 152(2)). The acts complained of by him are also arguably unfair labor practices, and, as to these the National Labor Relations Board also has exclusive jurisdiction.

Defendants respectfully submit that their motions to dismiss the above causes should be granted.

Livingston, Ross & Van Lopik, By: Nancy Jean Van Lopik, Attorneys for Defendants, 2144 First National Building, Detroit 26, Michigan, WOodward 2-4620.

Dated: May 7, 1963.

[fol. 36]

ATTACHMENT TO ANSWER TO PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION TO DISMISS AFFIDAVIT OF BENTON I. BILBREY—Filed August 19, 1963

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

BENTON I. BILBREY, being first duly sworn, deposes and says:

1. That he is the duly elected and acting President of Local 114, United Plant Guard Workers of America, as set forth in his affidavits previously filed in this cause and dated January 7 and January 28, 1963.

2. That this affidavit is supplementary to said previous affidavits.

3. That on or about the 14th day of February, 1963, he received a copy of a communication from the Office of the General Counsel of the National Labor Relations Board addressed to Mr. Donald F. Welday, Jr., attorney for plaintiff, Pinkerton's National Detective Agency, Inc. A true copy of said communication is attached hereto.

Further deponent sayeth not.

/s/ Benton I. Bilbrey
Benton I. Bilbrey

Subscribed and sworn to before me
this 30th day of April, 1963.

/s/ Ellen L. Hillstrom
Ellen L. Hillstrom

Notary Public, Wayne County, Michigan
My Commission expires March 29, 1964.

[fol. 37]

Attachment to Affidavit of Benton I. Bilbrey

NATIONAL LABOR RELATIONS BOARD

Office of the General Counsel

Washington 25, D. C.

February 13, 1963

Re: United Plant Guard Workers of
America (IND) Local 114
(Pinkerton National Detective
Agency, Inc.)
Case No. 7-CB-1008

Mr. Donald F. Welday, Jr.
Attorney at Law
Welday, O'Leary & Goldstone
1180 First National Building
Detroit 26, Michigan

Dear Mr. Welday:

Your appeal from the Regional Director's refusal to issue complaint in the above case, charging violations under Section 8 of the National Labor Relations Act, has been duly considered.

This Office sustains the ruling of the Regional Director. It was concluded that the evidence disclosed was insufficient to establish that the Union was responsible for the preparation or circulation of the leaflets in question by Doyle, an employee of the Company. In this connection, it was noted that Doyle, who was not a Union member, had neither real nor apparent authority from the Union to act on its behalf. Under all the circumstances, therefore, further proceedings herein were deemed unwarranted.

Very truly yours,

Stuart Rothman
General Counsel

By .....
Irving M. Herman
Director, Office of Appeals

cc: Director, 7th Region
Pinkerton National Detective Agency, Inc.,
2111 Woodward Avenue, Room 707,
Detroit 1, Michigan
United Plant Guard Workers of America, Local 114,
13722 Linwood Avenue,
Detroit 38, Michigan

CERTIFIED MAIL

[fol. 38]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

MEMORANDUM OPINION GRANTING DEFENDANTS' MOTION TO DISMISS—June 5, 1963

These are libel actions, based upon certain defamatory communications allegedly sent by defendants to employees of Pinkerton's National Detective Agency, hereinafter referred to as Pinkerton's. The plaintiff in Civil Action No. 23331, William C. Linn, is a supervisory employee of Pinkerton's who alleges that he was personally libelled by the communications in question.

Defendants in both actions are Local 114 of the United Plant Guard Workers of America, Benton I. Bilbrey, President of Local 114, W. T. England, Vice-President of Local 114, and one Leo J. Doyle, an employee of Pinkerton's who is not alleged to be either an officer or a member of Local 114.

There is no independent federal ground for the bringing of these actions in this Court. If they are properly before this Court, they can only be here on the basis of diversity of citizenship.

Prior to the commencement of these actions, Pinkerton's requested the National Labor Relations Board, hereinafter the NLRB, to issue a complaint against Local 114 on the ground that publication of the allegedly libelous communications constituted an unfair labor practice. After making his investigation, the Regional Director refused to issue a complaint. He found that the communications in question had been prepared by defendant Doyle, who was not a member of Local 114 and who had neither real nor apparent authority to act on behalf of Local 114. He concluded that there was no evidence to establish that Local 114 was involved in any way in the drafting or circulation of the pub-
[fol. 39] lications in question. This decision was appealed by Pinkerton's. The Appeals Office of the National Labor Relations Board on February 13 denied the appeal and sustained the ruling of the Regional Director.

Defendant Local 114, Bilbrey and England have moved for dismissal of both actions on the ground, inter alia, that exclusive jurisdiction over the subject matter lies in the NLRB and that this Court lacks authority to grant plaintiffs any relief. So far as the moving defendants are concerned, this contention is sound and must be sustained.

If Local 114 or its President or Vice-President were in fact responsible for distributing to Pinkerton's employees a false and defamatory publication which would tend to affect adversely the relations between Pinkerton's and its employees, this would arguably constitute an unfair labor practice under Section 8(b) of the National Labor Relations Act, a fact which Pinkerton's has tacitly admitted in requesting the Regional Director of the NLRB to issue a complaint. Even if Pinkerton's had not initially followed this course of action, however, this Court, sitting in these diversity actions as, "in effect, only another court of the State," *Guaranty Trust Co. v. York* (1945), 326 US 99, 108, would be without authority to give plaintiffs any relief against the moving defendants. The applicable rule has been laid down by the Supreme Court in *San Diego Building Trades v. Garmon* (1959), 359 US 236:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by Sec. 7 of the Taft-Hartley Act, or constitute an unfair labor practice under Sec. 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regu- [fol. 40] lation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes." 359 US 236, 244.

The moving defendants are entitled to dismissal of both actions as to them. An appropriate order may be presented.

Defendant Doyle has not moved for dismissal of the complaints against him, and the Court notes that the pre-emption argument would not appear to be applicable in his case. With dismissal of the other defendants, both suits are reduced to simple common-law tort actions. Local 114 has disclaimed any responsibility for the activities of defendant Doyle and this disclaimer has been upheld by both the Regional Director and the Office of Appeals of the NLRB. If, as alleged, defendant Doyle libelled Pinkerton's or Linn, this is a private matter which may aptly be resolved in this Court, if the usual jurisdictional requirements have been satisfied.

On the question of jurisdictional requirements, the Court observes that in both of these actions plaintiffs have attempted to satisfy the statutory requirement for diversity of citizenship by making certain allegations regarding the "residence" of the several plaintiffs and defendants. It is well-established that allegations regarding the residence of the parties are not sufficient to support federal jurisdiction in an action brought in a federal court on the basis of [fol. 41] diversity of citizenship. *Fort Knox Transit v. Humphrey* (6th Cir. 1945), 151 F2d 602.

If plaintiffs have not amended their complaints within ten days of the filing of this memorandum to sufficiently allege diversity of citizenship, defendant Doyle may present an order of dismissal to the Court for signature.

Talbot Smith, United States District Judge.

June 5, 1963, Detroit, Michigan.

[fol. 42]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

AMENDED COMPLAINT—Filed June 7, 1963

Now comes William C. Linn, plaintiff herein, by and through his attorneys, Welday, O'Leary & Goldstone, and amends his complaint heretofore filed as follows:

Count I

1. Paragraph 1 of Count I of said Complaint is amended to read thus:

That at the time and date of filing of this cause, plaintiff William C. Linn is a citizen and resident of the State of Ohio and all of the members of defendant United Plant Guard Workers of America, Local 114, a labor association, and defendants Leo J. Doyle, Benton I. Bilbrey and W. T. England are residents of and citizens of the State of Michigan. The matter in controversy exceeds, exclusively of interest and costs, the sum of Ten Thousand ($10,000.00) Dollars.

2. The plaintiff incorporates by reference herein the entire contents of the balance of Count I of the Complaint heretofore filed and realleges those paragraphs exactly as if they were here so stated.

Count II

1. Paragraph 1, of Count II, of the said Complaint, is amended to read thus:

Plaintiff realleges all those allegations contained in Paragraph 1 of Count I of its Amended Complaint, and Paragraphs 2 and 3 of Count I of his original Complaint, and said Counts are restated and incorporated hereunder by reference thereto.

[fol. 43] 2. Plaintiff incorporates by reference herein the entire contents of the balance of Count II of the Complaint

heretofore filed and realleges those paragraphs exactly as if they were here so stated.

Wherefore, plaintiff demands judgment against the defendants herein jointly and severally in the amount of One Million and no/100 ($1,000,000.00) Dollars, together with costs and attorney fees so most wrongfully sustained.

Welday, O'Leary & Goldstone, By: Donald F. Welday, Jr., Attorneys for the Plaintiff, 1180 First National Building, Detroit 26, Michigan, WOodward 5-5110.

[fol. 44]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

ORDER GRANTING MOTION TO DISMISS FOR LACK OF JURISDICTION OVER SUBJECT MATTER—June 20, 1963

Present: Honorable Talbot Smith, District Judge.

The motion of defendants, United Plant Guard Workers of America, Benton I. Bilbrey and W. T. England, to dismiss the action for want of jurisdiction of the subject matter having been heard on January 28, 1963, the plaintiff appearing by Donald F. Welday, Jr. and said defendants by Winston L. Livingston, their respective attorneys; and the parties having thereafter filed briefs in support of their respective positions; and the Court being fully advised in the premises; and in accordance with its opinion granting defendants' motion filed June 5, 1963;

It Is Ordered that the motion be granted, and judgment entered dismissing the complaint, as amended, for want of jurisdiction of the subject matter as to defendants, United Plant Guard Workers of America, Benton I. Bilbrey and W. T. England.

Talbot Smith, U. S. District Judge.

Approved as to form:

Donald F. Welday, Jr., Esq., Attorney for Plaintiffs.

[fol. 46] Minute entry of argument and submission—April 13, 1964 (omitted in printing).

[fol. 47]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15548

WILLIAM C. LINN, Plaintiff-Appellant,

v.

UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 114, a labor association, LEO J. DOYLE, BENTON I. BILBREY, W. T. ENGLAND, jointly and severally, Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Michigan.

OPINION—Decided October 13, 1964

Before CECIL and O'SULLIVAN, Circuit Judges, and MILLER, District Judge.

O'SULLIVAN, Circuit Judge. This appeal presents the question whether the National Labor Relations Board has preempted the diversity jurisdiction of a district court to entertain an action to recover damages for libel committed by a union and its officers in the course of, and arising out of tactics employed in, a union's organization campaign. The District Court so held in dismissing, on motion, such an action commenced by a management official against a union and its officers. On the authority of *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959), and the Supreme Court's decisions following *Garmon*, we affirm.

Plaintiff-appellant, William C. Linn, was at the times involved in 1962 an assistant general manager for the

North Central Region of Pinkerton's National Detective Agency, Inc. The complaint charged that during a campaign to organize Pinkerton's employees, defendant-appellee, United Plant Guard Workers of America, Local 114, [fol. 48] and defendants-appellees, Benton I. Bilbrey, President of the union local and W. T. England, its Vice-President, and one Leo J. Doyle, a Pinkerton guard, conspired to and did utter, publish, circulate and mail written matter maliciously libelling and defaming plaintiff Linn. For consideration of the question before us we accept that these statements were false, malicious, clearly libelous and damaging to plaintiff Linn, albeit they were relevant to the union's campaign.

Linn's employer filed an unfair labor practice charge against the union based upon the libelous material, but the Board's Acting Regional Director refused to issue a complaint upon his determination that "there is no evidence that the union was involved in any respect in the drafting and circulation of the leaflets." This refusal was affirmed by the N.L.R.B. Office of Appeals on February 13, 1963. On June 5, 1963, the District Judge filed a memorandum opinion supporting his order of dismissal stating:

> "If Local 114 or its President or Vice-President were in fact responsible for distributing to Pinkerton's employees a false and defamatory publication which would tend to affect adversely the relations between Pinkerton's and its employees, this would arguably constitute an unfair labor practice under Section 8(b) of the National Labor Relations Act. . . . "

and from this reasoned that the District Court was "without authority to give plaintiffs any relief against the moving defendants" (the union and its officers) under the now familiar language of *Garmon*: "when an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U.S. 245.

The *Garmon* decision appears to have been accepted as setting at rest the uncertainties that had remained as to just what traditional remedies could still be employed in the state courts to redress wrongs committed in the collisions between employers and employees' unions. It has been assumed that since *Garmon* the states can intrude into this field only when some "compelling state interest" such as "the maintenance of docestic peace" called for exercise of a state's traditional remedies. And it likewise [fol. 49] is assumed that only violence or the threat of violence will permit a state court to act. The considerations urged to sustain judicial jurisdiction in the present case were tentatively reflected in pre-*Garmon* decisions of the Supreme Court, and after full consideration were limited to the particular circumstances of those decisions by *Garmon* and subsequent decisions. Thus in *United Automobile Workers* v. *Russell,* 356 U.S. 634 (1958), and *United Constr. Workers* v. *Laburnum Constr. Corp.,* 347 U.S. 656, 98 L. Ed. 1025 (1954), the Supreme Court affirmed state court judgments for damages inflicted by the tortious conduct of labor unions committed as part of their organizational efforts. While each of these cases involved violence or threats of violence, neither of them relied on *violence* as the essential ingredient of permissible state action. Rather, it appeared that state jurisdiction was sustained because of the inadequacy of the National Labor Relations Act as a means of compensating for damaging torts. The opening paragraph of *Laburnum* announced the breadth of its holding.

> "The question before us is whether the Labor Management Relations Act, 1947, has given the National Labor Relations Board such exclusive jurisdiction over the subject matter of a *common-law tort action for damages* as to preclude an appropriate state court from hearing and determining its issues where such conduct constitutes an unfair labor practice under that Act. *For the reasons hereafter stated, we hold that it has not.* 347 U.S. 657, 98 L. Ed. 1027. (Emphasis supplied.)

Laburnum further expressed the view that "to the extent . . . that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, [as distinguished from preventive procedure], there is no ground for concluding that existing . . . *liabilities for tortious conduct have been eliminated.*" 347 U.S. 665, 98 L. Ed. 1031. (Emphasis supplied.) The Supreme Court also there took occasion to distinguish between its holding of Federal preemption in *Garner* v. *Teamsters Local 776,* 346 U.S. 485, 98 L. Ed. 228 (1953) and its approval of state jurisdiction in the *Laburnum* case then before it, saying that,

> "In the Garner Case, Congress had provided a federal administrative remedy, supplemented by judicial pro-[fol. 50] cedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. *For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation.* 347 U.S. 663-64, 98 L. Ed. 1031. (Emphasis supplied.)

The decision in *United Automobile Workers* v. *Russell,* 356 U.S. 634 (1958) appeared to express the same concern for retaining a state's right to redress damages inflicted on its citizens by tortious misconduct committed during the course of labor strife. As in *Laburnum,* the tortious conduct contained a *threat* of violence, since "the [picket] line consisted of persons standing along the street or walking in a compact circle across the entire traveled portion of the street. Such pickets, on July 18, by force of numbers, threats of bodily harm to Russell and of damage to his property, prevented him from reaching the plant gates. At least one striker took hold of Russell's automobile." While mentioning the threat of violence, it does not appear that *violence* was the sole reason for allowing Russell to recover damages for tortious interference with his means of earn-

ing a livelihood. Rather, the Court seemed to emphasize the lack of power in the NLRB to grant adequate relief. It said, "this section [§ 10(c) of the Act] is far from being an express grant of exclusive jurisdiction superseding common-law actions, by either an employer or an employee, to recover damages caused by the tortious conduct of a union. . . . We conclude that an employee's right to recover, in the state courts, *all* damages caused him by this kind of tortious conduct cannot fairly be said to be pre-empted without a clearer declaration of congressional policy than we find here." 356 U.S. 642, 646.

Without any intervening relevant amendment to the National Labor Relations Act, however, the Court in *Garmon* limited the application of *Laburnum* and *Russell* to torts involving violence.

> "It is true that we [in *Laburnum* and *Russell*] have allowed the States to grant compensation for the consequences as defined by the traditional law of torts, of conduct marked by *violence and imminent threats to* [fol. 51] *the public order*. . . . State jurisdiction has prevailed in these situations because the *compelling state interest,* in the scheme of our federalism, *in the maintenance of domestic peace* is not overridden in the absence of clearly expressed congressional direction. We recognize that the opinion in *United Construction Workers* v. *Laburnum Corp.,* 347 U.S. 656, found support in the fact that the state remedy had no federal counterpart. But that decision was determined, as is demonstrated by the question to which review was restricted, by the 'type of conduct' involved, *i.e.,* 'intimidation and threats of violence.' In the present case there is no such compelling state interest." 359 U.S. 247-48. (Emphasis supplied.)

The plaintiff here argues that we should recognize as a "compelling state interest" the protection of an individual's good name and reputation and thus come within the one exception to the preemptive rule of *Garmon.* It is indeed clear that physical assault and battery and libelous assault

upon a citizen's good name are both torts that cannot be compensated by a "cease and desist" order of the NLRB. An individual might quickly recover from the bruises and wounds of a physical assault and at little expense have a crumpled fender bumped out, but a lifetime may not be sufficient to restore a reputation hurt by the circulation of a vicious libel. We are persuaded, however, that *Garmon* has drawn the distinction which permits the one to be remedied by traditional court action and limits the other to the relief, if any, that may come from an order of the NLRB. And if a Regional Director's refusal to issue a complaint is sustained by the Board's General Counsel as happened to the company's charge in this case, the libelled individual is at the end of the remedial road. Compare *Dunn* v. *Retail Clerks Internat'l Ass'n,* 307 F(2) 285 (CA 6, 1962).

Our conclusion that *Garmon* has foreclosed plaintiff's entry into the courts is supported by the later decisions in *Local 100, United Ass'n of Journeymen & Apprentices* v. *Borden,* 373 U.S. 690 (1963) and *Local 207, Internat'l Ass'n of Bridge Workers* v. *Perko,* 373 U.S. 701 (1963) wherein, in obedience to *Garmon,* state courts were denied jurisdiction to entertain actions by workmen for intentional and tortious interference by a union with their means of [fol. 52] earning a livelihood. Such interference involved no *physical violence* and therefore the one exception recognized in *Garmon* was absent. We think that there would be as "compelling" a state interest to protect the workman's right to earn his wages as to protect his employer's good name, but such an interest was found insufficient justification for state jurisdiction in *Borden* and *Perko.*

Such courts as have had occasion since *Garmon* to consider the question of federal preemption of libel suits arising out of union organizational activity have concluded that state jurisdiction does not exist. *Hill* v. *Moe,* 367 P(2) 739 (Alaska 1961), *cert. denied,* 370 U.S. 916 (1962); *Blum* v. *International Ass'n of Machinists,* 42 N.J. 389, 201 A(2) 46 (1964); *Schnell Tool & Die Corp.* v. *Steel Workers,* 32 U.S.L. Week 2534 (Ohio Com. Pl. March

13, 1964). The only expression of a contraory view is found in the opinion of the three dissenters in *Blum* v. *Internat'l Ass'n of Machinists, AFL-CIO, supra.* We are satisfied that under *Garmon* these dissenters were wrong. We respect their dissent, however, as an understandable cry of anguish.

Our holding in this case is of course limited to a suit for libelous statements growing out of and relevant to a union's campaign to organize the employees of an employer subject to the National Labor Relations Act. We mention too that it is not necessary for us to inquire whether the individual defendant, Doyle, a Pinkerton employee, could have obtained dismissal by appropriate motion. He did not so move.

Judgment affirmed.

[File endorsement omitted]

[fol. 53]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15,548

WILLIAM C. LINN, Plaintiff-Appellant,

vs.

UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 114, a labor association, LEO J. DOYLE, BENTON I. BILBREY and W. T. ENGLAND, jointly and severally, Defendants-Appellees.

JUDGMENT—Filed October 13, 1964

Before: Cecil and O'Sullivan, Circuit Judges, and William E. Miller, District Judge.

Appeal from the United States District Court for the Eastern District of Michigan.

This Cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Michigan, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that defendants-appellees recover from plaintiff-appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

Carl W. Reuss, Clerk.

[fol. 54] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 55]

SUPREME COURT OF THE UNITED STATES
No. 819—October Term, 1964

WILLIAM C. LINN, Petitioner,

v.

UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 114, et al.

ORDER ALLOWING CERTIORARI—May 24, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

INDEX

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.....

WILLIAM C. LINN,
Petitioner,

vs.

UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 114, a Labor Association, LEO J. DOYLE, BENTON I. BILBREY, and W. T. ENGLAND,
Jointly and Severally,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

William C. Linn. petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on October 13, 1964.[1]

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the District Court is unreported; it is contained in the Record at page 38a thereof, and is printed in Appendix B hereto at pages 23-26. The opinion of the Circuit Court of Appeals, is reported at 337 F. 2d 68, and is printed in Appendix B at pages 16-22.

JURISDICTION

The judgment of the Circuit Court of Appeals, affirming the judgment of the District Court, was entered on October 13, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

Has Congress so clearly pre-empted the field of labor-management relations and declared it to be in the National Interest that an individual, who becomes the unfortunate victim of a malicious and vicious libel occurring during the course of a labor relations incident has now completely lost his only effective and historical right of recourse for this most damaging injury to his person?

---

[1] Leo J. Doyle is included as a respondent in the caption of this matter although he did not appeal, respond, defend or appear in the matter before the Court of Appeals. Neither was Doyle affected by the action of the Court of Appeals; his name was carried in the caption of the case in the Court of Appeals through the original inadvertent error of petitioner's counsel in so captioning that matter. Petitioner identifies Doyle as a respondent in this matter and has served his counsel with a copy of this petition in order to prevent a possible failure to comply with Rule 33(1).

STATUTES INVOLVED

The statutory provisions herein involved are: Section 1, of the Labor Management Relations Act of 1947 (29 U.S.C. 141) and Sections 1, 2, 7, 8, and 10 of the National Labor Relations Act (29 U.S.C. 151, 152, 157, 158, and 160). They are printed in Appendix A, *infra*, pp. 11-15.

STATEMENT UNDER RULE 33 (2) (b)

Since the proceeding draws into question the constitutionality of the National Labor Relations Act (29 U.S.C. Sec. 151 *et seq.*), an Act of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. Sec. 2403 may be applicable.

No Court of the United States as defined by 28 U.S.C. Sec. 451 has, pursuant to 28 U.S.C. Sec. 2403 certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn in question.

STATEMENT

Petitioner was, in 1962, employed in a supervisory capacity by Pinkerton's National Detective Agency, Inc. (R. 3a). In December, 1962, petitioner filed suit in the Federal District Court for the Eastern District of Michigan seeking damages against the respondents, alleging that the respondents had conspired maliciously to publish false and defamatory matter, and that they did so publish such matter, which was *libelous per se*, concerning petitioner (R. 4a). The jurisdiction of the Federal Courts was invoked because of diversity of citizenship of the parties, and the amount in controversy (28 U.S.C., Sec. 1332). It

was alleged in petitioner's complaint that respondent Local 114 was a labor association and that respondents *Bilbrey* and *England* were officers of the Local (R. 3a).

Previous to the institution of the lawsuit by petitioner, his employer (Pinkerton's National Detective Agency) had caused a charge against Local 114 to be filed with the Detroit, Michigan, office of the National Labor Relations Board (NLRB), based upon the same scurrilous material described in petitioner's complaint (R. 18a). The Acting Regional Director, without a hearing, refused to issue a complaint (R. 23a) and his refusal was sustained by the Office of the General Counsel of the NLRB (R. 37a).

Respondents had, meanwhile, filed a motion to dismiss petitioner's complaint in the District Court based, primarily, upon the pre-emption doctrine of *San Diego Building Trades Council v. Garmon,* 359 US 236 (R. 9a, 19a).

In its opinion dated June 5, 1963 (R. 38a) the Trial Court granted the motion to dismiss the complaint as it applied to the respondents. (The Order of Dismissal was entered June 20, 1963, R. 44a). The Trial Court based its actions on the pre-emption doctrine of *Garmon* (R. 39a) and found a lack of jurisdiction of the subject matter in so far as the Local Union, Bilbrey and England were concerned.

The Trial Court also *retained* jurisdiction of the suit in so far as *Doyle* was concerned, (R. 39a saying):

> "Defendant Doyle has not moved for dismissal of the complaint against him, and the Court notes that the pre-emption argument would not appear to be applicable in his case. With dismissal of the other defendants, both suits are reduced to simple common-law tort actions. Local 114 has disclaimed any responsibility for the activities of defendant Doyle and this disclaimer has been upheld by both the Re-

> gional Director and the Office of Appeals of the NLRB. If, as alleged, defendant Doyle libeled Pinkerton's or Linn, this is a private matter which may aptly be resolved in this Court * * *."

The Court below affirmed the Order of Dismissal entered by the District Court on the express authority of *San Diego Building Trades Council v. Garmon,* 359 US 236 (1959). (Appendix B, p. 16.)

Petitioner had urged that the protection of an *individual's* good name and reputation was of such "compelling state interest" so as to come within the *Garmon* pre-emption rule exception. The Court of Appeals, while accepting the fact that the statements published concerning petitioner "were false, malicious, clearly libelous, and damaging" (Appendix B, p. 17) and conceding that a cease and desist order of the NLRB could not correct the harm done thereby to an individual, (Appendix B, p. 21), determined with poorly-concealed reluctance that the *Garmon* rule would permit an action for negligently caused damage to an auto fender, but foreclosed a Court from compensating an individual for maliciously caused damages to his name and reputation through a vicious libel (Appendix B, p. 21).

REASONS FOR GRANTING THE WRIT

1. A question of national importance is presented herein by reason of its basic effect on national labor-management relations.

Passage of labor-management relations statutes by the Congress and the legislatures of the several states and the decisions of this Court in such cases as *United Construction Workers v. Laburnum,* 347 US 656, and *United Automobile Workers v. Russell,* 356 US 634, have materially aided in bringing about an era which is relatively free

from the swinging of clubs and fists which so often marked union organizational activities in the first four decades of this century. The commission of personal and property damage has no more rightful place in unionization attempts or contract bargaining than it does in any other sphere of civilized man's activities. Accordingly, it is most proper that parties injured by such violent conduct be recompensed for the damages caused to their persons and property through recourse to appropriate court proceedings as defined by the traditional law of torts; and as a consistent corollary thereto, future damaging activities in kind may be ordered halted. The promotion of a sound and sensible national labor-management relations policy cannot, and thus far wisely has not, allowed destruction of property and physical harm to individuals to have any place in the conduct of union-management affairs.

Because unrestrained destruction of property and personal injury cannot be conducive to sound and sensible solutions to labor-management problems and differences, it should follow that vicious and malicious destruction of personal name, honor, integrity and reputation likewise cannot aid in the solution of these problems. To petitioner, the inherent truth of this statement is self-evident. Yet, the court below, and others which have considered this question[2] have concluded that the rationale of *San Diego Building Trades v. Garmon, supra,* has foreclosed the victim of a malicious libel from recourse to his historical right of action when such a tort has been committed

---

[2] Supreme Court of Alaska by inference in *Hill v. Moe,* 367 P 2d 739, *cert. denied,* 370 US 916; Supreme Court of New Jersey in *Blum vs. International Association of Machinists, AFL-CIO,* 42 N.J. 389, 201 A 2d 46; Court of Common Pleas, Columbiana County, Ohio in *Schnell Tool & Die Corp. vs. United Steel Workers, AFL-CIO,* 200 N.E. 2d 727, affirmed Ohio Court of Appeals, 7th Dist., No. 852, see slip opinion, Appendix C, pp. 27-29, *infra.*

against him, if it is connected with a labor dispute. The Court of Appeals has left petitioner, and other individuals who are "employers" under the definition in Section 2 (2) of the NLRA [29 USC 152 (2)] (Appendix A, *infra*, p. 13) with only the *hope* that the National Labor Relations Board will decree that the offending union or individual tortfeasors must stop their scurrilous attacks against *him*. What is more important, the victim of such an attack *will never have the opportunity* to prove in Court that the maligning statements made are false.

The decision of the Court of Appeals has thus placed those occupying subservient or secondary "employers" status in a lawless gutter subject to the most vicious and malicious personal attacks imaginable, all without any effective method of recompense or redress. Literally read, the opinion of the court below invites, and can *open the door* to, another era of extremely unsavory labor-management relations.

It is respectfully suggested that until this Court speaks authoritatively concerning the viability of the time-honored remedies against malicious libel, even though it is committed in the course of a labor controversy, the legal, labor, management, and entire industrial communities will remain troubled by the opinion of the court below.

2. The decision of the court below is believed to be erroneous and in conflict with the holding of the Fourth Circuit in *Bouligny, Inc. v. United Steelworkers of America, AFL-CIO*, 336 F. 2d 160 (1964).

Bouligny involves a corporation's action for libel, growing out of an organizational campaign, filed against a labor union; the action was started in the North Carolina State Courts, and was removed "to the district court on the grounds both of diversity of citizenship and that the

subject matter of the action arises under the laws of the United States" [i.e., the National Labor Relations Act] 336 F. 2d at 161. Motion for remand back to the State court was filed by the corporation, denied by the District Court, but ordered by the Court of Appeals.

The Fourth Circuit held (after finding no diversity) that the National Labor Relations Act is concerned with libel in its *coercive* effect on labor-management relations but is *not* concerned with libel in its character as a common law tort, and that the suit for libel "is specifically within the aegis of the substantive state law" (336 F 2d at 165).

The *Bouligny* case was argued April 28, 1964, (15 days after the instant matter) and decided August 7, 1964, (approximately two months before the decision in the instant matter). In its thus contemporaneous holding that a libel committed during the course of a union's organizational campaign is within the power of a state court to remedy, *Bouligny* is at clear odds with the instant case.

Petitioner herein contends that *Bouligny* accurately states the law and that the decision in *Linn* is in error. It is necessary that this Court grant this petition to settle this dispute amongst the Circuit Courts of Appeal, and to correct the error committed by the Sixth Circuit Court of Appeals.

3. In holding that petitioner may not seek a jury trial to prove the gross falsity of the vicious accusations made against him, petitioner has been deprived of his most precious property—his good name and reputation—without due process of law.

By the reasoning of the court below, a person, such as petitioner, finding himself in a situation where he has been

maliciously accused of criminal activities and other vile actions, must prevail upon the management of the concern employing him to file a charge with the National Labor Relations Board, must have the Regional Director consent to issue a complaint and hold a hearing, and must further hope that the hearing will concern itself with the truth or falsity of the matters alleged. Conceivably, even if one were to get past the first and second of these hurdles, he will yet be unable to have his reputation cleared; conceivably, the mere utterance of certain words could be classified as either contrary to the Act, and an "unfair labor practice," or, fair comment. Neither decision would cure the harm done by the *personal* injury involved.

Amendment V, to the United States Constitution specifically prohibits the Congress from passage of any act which deprives one of property without due process of law. Petitioner contends that, if the opinion of the Court below accurately states the import of the National Labor Relations Act, then, insofar as that legislation deprives petitioner of the *right* to maintain his character, good name and reputation, that legislation is unconstitutional. Petitioner further contends, however, that the NLRA does not so deprive him of that right, and that reliance of the Court below on the *Garmon* decision, *supra*, is misplaced.[3]

---

[3] We submit that the Court of Appeals, in finding additional support for its ruling in the instant case through reliance on the post-*Garmon* decisions of *Local 100 United Ass'n of Journeymen & Apprentices vs. Borden*, 373 US 690 (1963), and *Local 207, Int. Ass'n of Bridge Workers vs. Perko*, 373 US 701 (1963), is also in error. At least two features distinguish *Borden* and *Perko* from the instant case. Pursuant to Sec. 10(c) of the National Labor Relations Act [29 USC 160(c)] it could have been within the Board's *competence* to have awarded lost back wages to both Borden and Perko. The Board could award Linn nothing which could possibly recompense him. Secondly, as stated in *Borden*, the conduct on which the suit was based was of such kind that its *lawfulness* could *initially* be judged *only* by the NLRB, applying federal standards. (373 US at 698.) The *lawfulness* of the conduct complained of in the present case must be judged by applying the standards of the state substantive law. *Bouligny vs. Steelworkers, supra*, at p. 165.

Petitioner prays that this Court will grant his petition and correct the erroneous reliance upon, and the expansion of *Garmon*.

Our position is that a reasonable man, with a minimal amount of historical, political and religious awareness, must abhor a concept that Congress did intend to deprive an individual of his common law right to protect his good name in a court of law and further distort such concept to pretend that deprivation of such right is in the national interest.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

DONALD F. WELDAY,
Counsel for Petitioner

WELDAY, O'LEARY, GOLDSTONE & BICHAN
Fifth Floor, Northland Tower
Southfield, Michigan 48076

Dated: January 4, 1965

APPENDIX A

SHORT TITLE AND DECLARATION OF POLICY

Section 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

NATIONAL LABOR RELATIONS ACT

FINDINGS AND POLICIES

Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of bur-

dening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

DEFINITIONS

Sec. 2. When used in this Act—

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

RIGHTS OF EMPLOYEES

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Section 8:

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A)employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

PREVENTION OF UNFAIR LABOR PRACTICES

Section 10. (a) The Board is empowered, as hereinafter provided to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer of labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

APPENDIX B

OPINIONS BELOW

No. 15548

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

WILLIAM C. LINN,
Plaintiff-Appellant,
v.
UNITED PLANT GUARD WORKERS OF AMERICA, Local 114, a labor association, LEO J. DOYLE, BENTON I. BILBREY, W. T. ENGLAND, jointly and severally,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Michigan.

Decided October 13, 1964.

Before CECIL and O'SULLIVAN, Circuit Judges, and MILLER, District Judge.

O'SULLIVAN, Circuit Judge. This appeal presents the question whether the National Labor Relations Board has preempted the diversity jurisdiction of a district court to entertain an action to recover damages for libel committed by a union and its officers in the course of, and arising out of tactics employed in, a union's organization campaign. The District Court so held in dismissing, on motion, such an action commenced by a management official against a union and its officers. On the authority of *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), and the Supreme Court's decisions following *Garmon*, we affirm.

Plaintiff-appellant, William C. Linn, was at the times involved in 1962 an assistant general manager for the North Central Region of Pinkerton's National Detective Agency, Inc. The complaint charged that during a campaign to organize Pinkerton's employees, defendant-appellee, United Plant Guard Workers of America, Local 114, and defendants-appellees, Benton I. Bilbrey, President of the union local and W. T. England, its Vice-President, and one Leo J. Doyle, a Pinkerton guard, conspired to and did utter, publish, circulate and mail written matter maliciously libelling and defaming plaintiff Linn. . For consideration of the question before us we accept that these statements were false, malicious, clearly libelous and damaging to plaintiff Linn, albeit they were relevant to the union's campaign.

Linn's employer filed an unfair labor practice charge against the union based upon the libelous material, but the Board's Acting Regional Director refused to issue a complaint upon his determination that "there is no evidence that the union was involved in any respect in the drafting and circulation of the leaflets." This refusal was affirmed by the N.L.R.B. Office of Appeals on February 13, 1963. On June 5, 1963, the District Judge filed a memorandum opinion supporting his order of dismissal stating:

> "If Local 114 or its President or Vice-President were in fact responsible for distributing to Pinkerton's employees a false and defamatory publication which would tend to affect adversely the relations between Pinkerton's and its employees, this would arguably constitute an unfair labor practice under Section 8(b) of the National Labor Relations Act. * * *"

and from this reasoned that the District Court was "without authority to give plaintiffs any relief against the moving defendants" (the union and its officers) under the now familiar language of *Garmon:* "when an activity is arguably subject to §7 or §8 of the Act, the States as well as

the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U.S. 245.

The *Garmon* decision appears to have been accepted as setting at rest the uncertainties that had remained as to just what traditional remedies could still be employed in the state courts to redress wrongs committed in the collisions between employers and employees' unions. It has been assumed that since Garmon the states can intrude into this field only when some "compelling state interest" such as "the maintenance of domestic peace" called for exercise of a state's traditional remedies. And it likewise is assumed that only violence or the threat of violence will permit a state court to act. The considerations urged to sustain judicial jurisdiction in the present case were tentatively reflected in pre-*Garmon* decisions of the Supreme Court, and after full consideration were limited to the particular circumstances of those decisions by *Garmon* and subsequent decisions. Thus in *United Automobile Workers v. Russell*, 356 U.S. 634 (1958), and *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 98 L. Ed. 1025 (1954), the Supreme Court affirmed state court judgments for damages inflicted by the tortious conduct of labor unions committed as part of their organizational efforts. While each of these cases involved violence or threats of violence, neither of them relied on *violence* as the essential ingredient of permissible state action. Rather, it appeared that state jurisdiction was sustained because of the inadequacy of the National Labor Relations Act as a means of compensating for damaging torts. The opening paragraph of *Laburnum* announced the breadth of its holding.

> "The question before us is whether the Labor Management Relations Act, 1947, has given the National Labor Relations Board such exclusive jurisdiction over the subject matter of a *common-law tort action for damages* as to preclude an appropriate state court from hearing and determining its issues where such

> conduct constitutes an unfair labor practice under that Act. *For the reasons hereafter stated, we hold that it has not.* 347 U.S. 657, 98 L. Ed. 1027. (Emphasis supplied.)

Laburnum further expressed the view that "to the extent * * * that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, [as distinguished from preventive procedure], there is no ground for concluding that existing * * * *liabilities for tortious conduct have been eliminated.*" 347 U.S. 665, 98 L. Ed. 1031. (Emphasis supplied.) The Supreme Court also there took occasion to distinguish between its holding of Federal preemption in *Garner v. Teamsters Local* 776, 346 U.S. 485, 98 L. Ed. 228 (1953) and its approval of state jurisdiction in the *Laburnum* case then before it, saying that,

> "In the Garner Case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injustice procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. *For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation.* 347 U.S. 663-64, 98 L. Ed. 1031. (Emphasis supplied.)

The decision in *United Automobile Workers v. Russell*, 356 U.S. 634 (1958) appeared to express the same concern for retaining a state's right to redress damages inflicted on its citizens by tortious misconduct committed during the course of labor strife. As in *Laburnum*, the tortious conduct contained a *threat* of violence, since "the [picket] line consisted of persons standing along the street or walking in a compact circle across the entire traveled portion of the street. Such pickets, on July 18, by force of numbers, threats of bodily harm to Russell and of damage to his property, prevented him from reaching the plant gates.

At least one striker took hold of Russell's automobile." While mentioning the threat of violence, it does not appear that *violence* was the sole reason for allowing Russell to recover damages for tortious interference with his means of earning a livelihood. Rather, the Court seemed to emphasize the lack of power in the NLRB to grant adequate relief. It said, "this section [§10(c) of the Act] is far from being an express grant of exclusive jurisdiction superseding common-law-actions, by either an employer or an employee, to recover damages caused by the tortious conduct of a union. * * * We conclude that an employee's right to recover, in the state courts, *all* damages caused him by this kind of tortious conduct cannot fairly be said to be pre-empted without a clearer declaration of congressional policy than we find here." 356 U.S. 642, 646.

Without any intervening relevant amendment to the National Labor Relations Act, however, the Court in *Garmon* limited the application of *Laburnum* and *Russell* to torts involving violence.

> "It is true that we [in *Laburnum* and *Russell*] have allowed the States to grant compensation for the consequences as defined by the traditional law of torts, of conduct marked by *violence and imminent threats to the public order*." * * * State jurisdiction has prevailed in these situations because the *compelling state interest*, in the scheme of our federalism, *in the maintenance of domestic* peace is not overridden in the absence of clearly expressed congressional direction. We recognize that the opinion in *United Construction Workers v. Laburnum Corp.*, 347 U.S. 656, found support in the fact that the state remedy had no federal counterpart. But that decision was determined, as is demonstrated by the question to which review was restricted, by the 'type of conduct' involved, *i. e.*, 'intimidation and threats of violence.' In the present case there is no such compelling state interest." 359 U.S. 247-48. (Emphasis supplied.)

The plaintiff here argues that we should recognize as a "compelling state interest" the protection of an individual's good name and reputation and thus come within the one exception to the preemptive rule of *Garmon*. It is indeed clear that physical assault and battery and libelous assault upon a citizen's good name are both torts that cannot be compensated by a "cease and desist" order of the NLRB. An individual might quickly recover from the bruises and wounds of a physical assault and at little expense have a crumpled fender bumped out, but a lifetime may not be sufficient to restore a reputation hurt by the circulation of a vicious libel. We are persuaded, however, that *Garmon* has drawn the distinction which permits the one to be remedied by traditional court action and limits the other to the relief, if any, that may come from an order of the NLRB. And if a Regional Director's refusal to issue a complaint is sustained by the Board's General Counsel as happened to the company's charge in this case, the libelled individual is at the end of the remedial road. Compare *Dunn v. Retail Clerks Internat'l Ass'n*, 307 F(2) 285 (CA 6, 1962).

Our conclusion that *Garmon* has foreclosed plaintiff's entry into the courts is supported by the later decisions in *Local 100, United Ass'n of Journeymen & Apprentices v. Borden*, 373 U.S. 690 (1963) and *Local 207, Internat'l Ass'n of Bridge Workers v. Perko*, 373 U.S. 701 (1963) wherein, in obedience to *Garmon*, state courts were denied jurisdiction to entertain actions by workmen for intentional and tortious interference by a union with their means of earning a livelihood. Such interference involved no *physical violence* and therefore the one exception recognized in *Garmon* was absent. We think that there would be as "compelling" a state interest to protect the workman's right to earn his wages as to protect his employer's good name, but such an interest was found insufficient justification for state jurisdiction in *Borden* and *Perko*.

Such courts as have had occasion since *Garmon* to consider the question of federal preemption of libel suits arising out of union organizational activity have concluded that

state jurisdiction does not exist. *Hill v. Moe*, 367 P(2) 739 (Alaska 1961), *cert. denied*, 370 U.S. 916 (1962); *Blum v. International Ass'n of Machinists*, 42 N.J. 389, 201 A(2) 46 (1964); *Schnell Tool & Die Corp. v. Steel Workers*, 32 U.S.L. Week 2534 (Ohio Com. Pl. March 13, 1964). The only expression of a contrary view is found in the opinion of the three dissenters in *Blum v. Internat'l Ass'n of Machinists, AFL-CIO, supra.* We are satisfied that under *Garmon* these dissenters were wrong. We respect their dissent, however, as an understandable cry of anguish.

Our holding in this case is of course limited to a suit for libelous statements growing out of and relevant to a union's compaign to organize the employees of an employer subject to the National Labor Relations Act. We mention too that it is not necessary for us to inquire whether the individual defendant, Doyle, a Pinkerton employee, could have obtained dismissal by appropriate motion. He did not so move.

Judgment affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PINKERTON'S NATIONAL DETECTIVE AGENCY, INC., a Delaware Corporation,
Plaintiff,
v.
UNITED PLANT GUARD WORKERS OF AMERICA, Local 114, a labor association, LEO J. DOYLE, BENTON I. BILBREY, W. T. ENGLAND, jointly and severally,
Defendants.
Civil Action No. 23330

WILLIAM C. LINN,
Plaintiff,
v.
UNITED PLANT GUARD WORKERS OF AMERICA, Local 114, a labor association, LEO J. DOYLE, BENTON I. BILBREY, W. T. ENGLAND, jointly and severally,
Defendants.
Civil Action No. 23331

MEMORANDUM OF OPINION GRANTING DEFENDANTS' MOTION TO DISMISS

These are libel actions, based upon certain defamatory communications allegedly sent by defendants to employees of Pinkerton's National Detective Agency, hereinafter referred to as Pinkerton's. The plaintiff in Civil Action No. 23331, William C. Linn, is a supervisory employee of Pinkerton's who alleges that he was personally libeled by the communications in question.

Defendants in both actions are Local 114 of the United Plant Guard Workers of America, Benton I. Bilbrey, President of Local 114, W. T. England, Vice-President of Local 114, and one Leo J. Doyle, an employee of Pinkerton's who is not alleged to be either an officer or a member of Local 114.

There is no independent federal ground for the bringing of these actions in this Court. If they are properly before this Court, they can only be here on the basis of diversity of citizenship.

Prior to the commencement of these actions, Pinkerton's requested the National Labor Relations Board, hereinafter the NLRB, to issue a complaint against Local 114 on the ground that publication of the allegedly libelous communications constituted an unfair labor practice. After making his investigation, the Regional Director refused to issue a complaint. He found that the communications in question had been prepared by defendant Doyle, who was not a member of Local 114 and who had neither real nor apparent authority to act on behalf of Local 114. He concluded that there was no evidence to establish that Local 114 was involved in any way in the drafting or circulation of the publications in question. This decision was appealed by Pinkerton's. The Appeals Office of the National Labor Relations Board on February 13 denied the appeal and sustained the ruling of the Regional Director.

Defendant Local 114, Bilbrey and England have moved for dismissal of both actions on the ground, inter alia, that exclusive jurisdiction over the subject matter lies in the NLRB and that this Court lacks authority to grant plaintiffs any relief. So far as the moving defendants are concerned, this contention is sound and must be sustained.

If Local 114 or its President or Vice-President were in fact responsible for distributing to Pinkerton's employees a false and defamatory publication which would tend to affect adversely the relations between Pinkerton's and its employees, this would arguably constitute an unfair labor

practice under Section 8 (b) of the National Labor Relations Act, a fact which Pinkerton's has tacitly admitted in requesting the Regional Director of the NLRB to issue a complaint. Even if Pinkerton's had not initially followed this course of action, however, this Court, sitting in these diversity actions as, "in effect, only another court of the State," *Guaranty Trust Co. v. York* (1945), 326 US 99, 108, would be without authority to give plaintiffs any relief against the moving defendants. The applicable rule has been laid down by the Supreme Court in *San Diego Building Trades v. Garmon* (1959), 359 US 236:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by Sec. 7 of the Taft-Hartley Act, or constitute an unfair labor practice under Sec. 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes." 359 US 236, 244.

The moving defendants are entitled to dismissal of both actions as to them. An appropriate order may be presented.

Defendant Doyle has not moved for dismissal of the complaints against him, and the Court notes that the preemption argument would not appear to be applicable in his case. With dismissal of the other defendants, both suits are reduced to simple common-law tort actions. Local 114 has disclaimed any responsibility for the activities of defendant Doyle and this disclaimer has been upheld by both

the Regional Director and the Office of Appeals of the NLRB. If, as alleged, defendant Doyle libeled Pinkerton's or Linn, this is a private matter which may aptly be resolved in this Court, if the usual jurisdictional requirements have been satisfied.

On the question of jurisdictional requirements, the Court observes that in both of these actions plaintiffs have attempted to satisfy the statutory requirement for diversity of citizenship by making certain allegations regarding the "residence" of the several plaintiffs and defendants. It is well-established that allegations regarding the residence of the parties are not sufficient to support gederal jurisdiction in an action brought in a federal court on the basis of diversity of citizenship. *Fort Knox Transit v. Humphrey* (6th Cir 1945), 151 F2d 602.

If plaintiffs have not amended their complaints within ten days of the filing of this memorandum to sufficiently alleged diversity of citizenship, defendant Doyle may present an order of dismissal to the Court for signature.

Talbot Smith,
United States District Judge.

June 5, 1963.
Detroit, Michigan.

APPENDIX C

OPINION, OHIO COURT OF APPEALS No. 852

SCHNELL TOOL & DIE CORPORATION vs. UNITED STEELWORKERS

STATE OF OHIO, COLUMBIANA COUNTY
IN THE COURT OF OPPEALS
SEVENTH DISTRICT

SCHNELL TOOL & DIE CORPORATION and SALEM STAMPING & MANUFACTURING COMPANY, *Plaintiffs-Appellants*, v. UNITED STEELWORKERS OF AMERICA, AFL-CIO, et al., *Defendants-Appellees.*	Case No. 852

OPINION

Appearances: Baker, Hostetler & Patterson, Cleveland, Ohio, and Ralph Atkinson, Salem, Ohio, for plaintiffs-appellants; Green, Schiavoni, Murphy & Stevens, Youngstown, Ohio, for defendants-appellees.

Hon. Paul W. Brown,
Hon. James G. France,
Hon. George M. Jones, JJ.

Dated: December 3, 1964

Brown, P. J.

Let it be stated at the outset that this court cannot conclude from an examination of the Labor Management Relations Act, as amended, that it was the intention of Congress to preempt the jurisdiction of a state court to grant a rem-

edy to redress damages inflicted by tortious misconduct during the course of labor strife.

It would seem easy to require Congress to express in plain language its intention to pass from the courts to the National Labor Relations Board the power to deal with the valuable right of one to be secure in his good name in these situations.

The United States Supreme Court in San Diego Building Trades Council, et al. v. Garmon, 359 U. S. 236, 3 L. Ed. (2d) 775, when discussing the reasons for concluding that the states retain the right to redress damage claims founded upon conduct marked by violence and do not retain a similar right in other tort cases, speak of "compelling state interest" as opposed to "the danger of state interference with national policy". We do not see how the pendency of an action for damages in a state court can amount to "interference with national policcy" as expressed by the Act.

However, it is the unanimous view of this court that we no longer have jurisdiction to consider actions for damages for non-violent tortious conduct allegedly committed by a union, its officers or agents, in the course of a labor dispute involving employer in interstate commerce. We find this to be the true import of the pronouncement of the majority of the United States Supreme Court in San Diego Building Trade Council, et al. v. Garmon, 359 U. S. 236, 3 L. Ed. (2d) 775. That case, and particularly headnote 4 thereof, held that the effect of the Labor Management Act as "translated into concreteness by the process of litigating elucidation" eliminated the power of the state court to function in this area.

The Garmon case specifically holds that an activity subject to Section 7 or Section 8 of the Act is so protected by the Act that the states, as well as the federal courts, must defer to the exclusive competence of the National Labor Relations Board.

Our view of the effect of Garmon upon this cause of action is supported by he later decision originating in this district and styled Local 207 International Association of Bridge Workers v. Perko, 373 U. S. 701, as well as Hill v. Moe, 367 Pacific (2d) 739, cert. denied 370 U. S. 916; and Blum v. International Association of Machinists, 42 N. J. 389, 201 Atlantic (2d) 46.

Judgment of the Court below is therefore affirmed.

France, J., concurs.
Jones, J., concurs.

Approved:
Paul W. Brown,
Judge.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 45

WILLIAM C. LINN,
Petitioner,

vs.

UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 114, a Labor Association, LEO J. DOYLE, BENTON I. BILBREY, and W. T. ENGLAND,
Jointly and Severally,
Respondents

~~MOTION FOR LEAVE TO~~ SUPPLEMENT APPENDIX TO PETITION FOR A WRIT OF CERTIORARI AND MOTION FOR EXTENSION OF TIME FOR FILING BRIEF IN OPPOSITION TO CERTIORARI

DONALD F. WELDAY,
Counsel for Petitioner,
Fifth Floor, Northland Tower,
Southfield, Michigan 48076.

WELDAY, O'LEARY, GOLDSTONE & BICHAN,
Of Counsel.

Interstate Brief & Record Co., 356 Congress St. E., Detroit 26, Michigan

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 819

WILLIAM C. LINN,
Petitioner,

vs.

UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 114, a Labor Association, LEO J. DOYLE, BENTON I. BILBREY, and W. T. ENGLAND,
Jointly and Severally,
Respondents

MOTION FOR LEAVE TO SUPPLEMENT APPENDIX TO PETITION FOR A WRIT OF CERTIORARI AND MOTION FOR EXTENSION OF TIME FOR FILING BRIEF IN OPPOSITION TO CERTIORARI

Now comes William C. Linn, petitioner in the above captioned matter, by his attorney, Donald F. Welday, pursuant to Rule 35 of the Rules of the Supreme Court of the United States, and moves this Honorable Court for leave to supplement the Appendix heretofore filed with his

Petition for a Writ of Certiorari and, for an extension of the time within which respondents hereto may file a brief in opposition to said petition for a writ of certiorari. In support of this Motion, counsel says:

1. That on January 9, 1965, a Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, in the matter styled and captioned as above, was duly and timely filed with this Honorable Court, and service thereof was made upon counsel for the named respondents and upon the Solicitor General of the United States.

2. That on January 5, 1965, the Supreme Court of Pennsylvania decided the case of *Meyer et al. v. Joint Council 53, International Brotherhood of Teamsters, et al.*, ... Pa. ..., ... A.2d ..., 33 Law Week 2354 (issue of January 19, 1965).

3. That petitioner and his counsel were not and could not have been aware of the Pennsylvania decision until after the petition for a writ of certiorari in the instant matter had been printed and filed with this Court.

4. The opinion of the Pennsylvania Court in *Meyer* is directly in point with the issues presented to the Court below in the instant matter, and is in direct conflict with the decision of the Court below (e.g., *Meyer v. International Brotherhood of Teamsters, supra,* fn. 10). (*Infra,* p. 9.)

5. That because the *Meyer* decision is in strong support of the position of petitioner as recited in paragraphs 1 and 3 under the heading "Reasons for Granting the Writ," in the petition heretofore filed and because the *Meyer* decision *clearly* demonstrates the conflict of decisions presented in paragraph 2 under said heading in the instant petition,

and pointedly notes the unsettled nature of the issue presented in the instant petition for a writ of certiorari, counsel would have, had he been aware thereof, included the aforesaid *Meyer* decision, in its entirety in the Appendix to the petition heretofore filed in this cause.

6. Petitioner and his counsel sincerely and honestly believe that the inclusion of the decision of the Pennsylvania Supreme Court in *Meyer v. International Brotherhood of Teamsters, supra,* in petition heretofore filed in this matter, will be of material and substantial aid and interest to this Honorable Court in arriving at its decision on said petition, and should be considered by this Court in arriving at that decision.

7. Petitioner and his counsel believe that, in the interests of justice and in accordance with the spirit of and the permissive authority contained in Rule 34 of the Rules of the Supreme Court, should petitioner be allowed to supplement the Appendix to his petition for a writ of certiorari, as herein prayed, the respondents hereto should be allowed additional time within which they might file briefs in opposition to the petition.

8. This motion is not made contumaciously or for purposes of delay, or confusion; to the contrary, it is made solely for the purpose of presenting to this Honorable Court that information which petitioner and his counsel honestly believe should be so presented.

Wherefore, petitioner respectfully moves this Honorable Court for leave to file and have considered as part of the Appendix to his Petition for a Writ of Certiorari, the decision in full of the Pennsylvania Supreme Court in the case of *Meyer et al. v. Joint Council 53, International Brotherhood of Teamsters et al.* (annexed hereto at pages 5 to 19) under caption "Appendix D") and further moves this Hon-

orable Court for an extension of time for the filing of briefs in opposition to the petition for a writ of certiorari.

DONALD F. WELDAY,
Counsel for Petitioner,

WELDAY, O'LEARY, GOLDSTONE & BICHAN,
Fifth Floor, Northland Towers,
Southfield, Michigan 48076

Dated: January 21, 1965.

"APPENDIX D"

OPINION OF THE COURT

(Filed January 5, 1965)

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

Nos. 269, 272 January Term, 1964

CHARLES MEYER, et al. v. JOINT COUNCIL 53, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, et al., *Appellants.*	Appeals from the Order of the Court of Common Pleas No. 5 (Heard in C.P. No. 6) of the County of Philadelphia, as of June Term, 1963, No. 2479.

ROBERTS, J.

Plaintiffs, six individuals, filed a complaint in trespass against seven individuals and five unincorporated labor organizations seeking damages for libel. The alleged defamation appeared in a printed tabloid called "Teamsters Extra"[1] which was specially issued during a campaign preceding a National Labor Relations Board [NLRB] representation election.[2]

---

[1] A copy of the tabloid, Vol. 1, No. 1, is reproduced in the Appendix.

[2] Plaintiffs were campaigning in behalf of a labor organization known as "The Voice of the Teamsters Democratic Organizing Committee" [Voice]. Voice was attempting to oust the defendant local unions as collective bargaining representative for certain employees in a multi-employer association bargaining unit known as "Motor Transport Relations, Inc."

(Continued on next page)

The complaint alleged that defendants, with willful and malicious intent to injure plaintiffs, published articles, sketches, and pictures in the "Teamsters Extra" which contained malicious and defamatory material. Among the statements was one which proclaimed that the top officers, members of the executive board, and active leaders of the organization have been individually convicted of one or more of a list of crimes. On the list were such crimes as burglary, manslaughter, rape, sodomy, and corrupting the morals of a minor.[3]

(Continued from preceding page)

The tabloid in question was circulated in November 1962, about one week before the election was held. After the election was won by defendant unions, Voice filed with the NLRB objections to the conduct of the election and to conduct affecting the results of the election.

One objection alleged that defendant unions had published criminally libelous statements concering Voice executive board members, and that the statements influenced employees not to vote for Voice and prevented the conduct of the election in a proper atmosphere. The Regional Director of the NLRB was of the view that this objection should be overruled since the allegations involved were not within the special knowledge of the defendants, and Voice had ample opportunity to correct the alleged distortions and misrepresentations. The Board accepted this recommendation.

The Board, however, set aside the election on the basis of other recommendations made by the Regional Director.

[3] In its complete listing, the tabloid enumerated assault and battery, disorderly conduct, public indecency, burglary, larceny of auto, non-support of family, illegal lottery, hold-up at point of gun, receiving stolen goods, larceny by pick pocket, robbery, unlawful possession of drugs, assault and battery with intent to ravish and rape, rape, sodomy, obscene literature, manslaughter, attempted extortion, booking gambling bets, impersonating police officer, habitual drunk, larceny, corrupting the morals of a minor.

Plaintiffs alleged that use of the pictures, sketches, and words was meant to convey to readers that plaintiffs were hardened criminals, bent on violence, guilty of serious crimes such as rape and burglary and that they were unworthy of consideration as union leaders.

Defendants filed preliminary objections which challenged jurisdiction. These were dismissed by the court below. On this appeal attacking the lower court's ruling, defendants have raised the question of whether the jurisdiction of our state courts is preempted by provisions of the National Labor Relations Act. Certain of the defendants have raised an additional question concerning exhaustion of internal union remedies.

I.

We consider, first, the claim of federal preemption. The landmark case involving preemption in the labor field is *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 79 S. Ct. 773 (1959), which held that a state court lacked jurisdiction to award damages for conduct constituting a tortious unfair labor practice under state law. In that case, the tortious activity consisted of peaceful union picketing designed to compel employers to execute a contract which would provide that only union members, or workers who applied for union membership within 30 days, would remain in their employ.[4] Recognizing a congressional purpose, as expressed in relevant legislation, to foster the development of a uniform national labor policy through administrative regulation by the NLRB, the Supreme Court of the United States based its holding on the general principle that both state and federal courts

[4] The employers had refused to execute the contract, claiming that none of the employees had shown a desire to join a union, and that, in any event, they could not accept such an arrangement until one of the unions had been designated by the employees as a collective bargaining agent. It was alleged that the peaceful picketing was designed to exert pressure on customers and suppliers in order to persuade them to stop dealing with the employers and to thereby compel execution of the proposed contract.

must defer to the exclusive competence of the Board when the activity involved is arguably subject to Section 7[5] or Section 8[6] of the National Labor Relations Act. The Supreme Court further noted that previous cases permitting state courts to award damages for tortious activities marked by violence and imminent threats to public order were based on the principle that "the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overriden in the absence of clearly expressed congressional direction." *Id.* at 247, 79 S. Ct. at 781. The Court found no such interest to be involved in the *Garmon* case.

We assume, as defendants contend, that the activities of the defendants in the present case are arguably subject to Section 7[7] or 8[8] of the Act. But even assuming this, we still reach the conclusion that our state courts are not precluded from exercising jurisdiction over libel actions

---

[5] Act of July 5, 1935, c. 372, §7, 49 Stat. 452, as amended, 29 U.S.C.A. §157. *Infra* note 7.

[6] Act of July 5, 1935, c. 372, §8, 49 Stat. 452, as amended, 29 U.S.C.A. §158. *Infra* note 8.

[7] "Employees shall have the right to self-organization, to form, join, or assist labor organizations * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." §7, *supra* note 5.

[8] Section 8 proscribes certain unfair labor practices. In addition, among its provisions is subsection (c) which reads:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." §8, *supra*, note 6.

arising from labor activities.[9] Following the principles set forth in *Garmon*, the question we must determine is whether there is a compelling state interest, especially in the maintenance of domestic peace, upon which state jurisdiction over a libel suit can be predicated.[10] We believe that such an interest does exist.

---

[9] Some courts which have faced the question have decided that state jurisdiction over libel published in labor disputes has been preempted by NLRB jurisdiction. *Linn v. United Plant Guard Workers*, 337 F.2d 68 (6th Cir. 1964); *Blum v. Int'l Ass'n of Machinists*, 42 N.J. 389, 201 A.2d 46 (1964); *Hill v. Moe*, 367 P.2d 739 (Sup. Ct. Alaska 1961), *cert. denied*, 370 U.S. 916, 82 S.Ct. 1554 (1962); *Warehouse & Produce Workers Local 599, IBT v. United States Gypsum Co.*, 50 CCH Lab. Cas. 19,196 (Super. Ct. Wash. 1963); *Schnell Tool & Die Corp. v. United Steelworkers*, 200 N.E.2d 727 (Ohio C.P. 1964); *cf. Teamsters Local 150, IBT v. Superior Court*, 39 Cal. Rep. 590, 50 CCH Lab. Cas. 19,184 (Calif. Dist. Ct. App. 1964) (refusing injunction for libel). Most of these cases have relied on *Blum, supra*.

A result in accord with our view was reached in *California Dump Truck Owners Ass'n v. Joint Council of Teamsters*, 45 CCH Lab. Cas. 50,546 (Calif. Super. Ct. 1962). And see *Salzhandler v. Caputo*, 316 F.2d 445, 451 (2d Cir.), *cert. denied*, 375 U.S. 946, 84 S.Ct. 344 (1963) (dictum), to the effect that libelous statements in labor activities can be the basis for civil suits. See Cox, "Federalism in the Law of Labor Relations," 67 Harv. L. Rev. 1297, 1321 (1954): "Words privileged under NLRA Section 8(c) may give union leaders a cause for action for defamation." See also *Cussack v. Moran*, 46 CCH Lab. Cas. 50,749 (Sup. Ct. N.Y. 1963) (implied) (granting damages for labor libel).

[10] In *Linn v. United Plant Guard Workers, supra* note 9, the court of appeals held that neither state nor federal jurisdiction exist where the libelous statements involved grew out of a union organizational campaign. The theory on which this holding was predicated was that under *Garmon* only violence or the threat of violence would permit the exercise of such jurisdiction. We cannot agree that the language used in *Garmon* justifies such a narrow interpretation of the area of jurisdiction left to the state and federal courts. (See also note 16 *infra*.) *Compare* Michelman, "State Power to Govern Concerted Employee Activities," 74 Harv. L. Rev. 641, 667 (1961):

> "Thus, if the statements are, as a matter of state law, defamatory and untrue, an employer should have access to the usual remedies for libel or slander. Nor would this seem to be an appropriate occasion for requiring prior submission of the case to the NLRB. Not only are state courts more accustomed to dealing with such issues than is the Board but since the very elements of the state cause of action will establish that the conduct is not federally privileged, there is little danger that the effectuation of state policy will destroy a privilege intended to be conferred by federal law." (Footnote omitted.)

In determining that there is such an interest which permits the court below to exercise jurisdiction, we find persuasive the language used in *Garmon* and by the same author in *Beauharnais v. Illinois*, 343 U.S. 250, 72 S. Ct. 725 (1952). In *Garmon* the Court explained the important policies which permit state jurisdiction even where the activities involved are arguably subject to NLRB jurisdiction:

> "[D]ue regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act * * *. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Id.* at 243, 79 S.Ct. at 779.

Writing for the majority in *Beauharnais*, Justice Frankfurter (the writer of *Garmon*) said in reference to an Illinois statute:

> "Moreover, the [Illinois] Supreme Court's characterization of the words prohibited by the statute as those 'liable to cause violence and disorder' paraphrases the traditional justification for punishing libels criminally, namely their 'tendency to cause breach of the peace.'" *Id.* at 254, 72 S.Ct. at 729.

Justice Frankfurter went on to reiterate that:

> "'There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd

> and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly out-weighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."'" *Id.* at 255-57, 72 S. Ct. at 730-31.[11]

The clear and historically concerned interest of the state in providing a peaceful forum to which individuals whose reputations have been damaged by false and injurious statements can bring their claims should not be frustrated

---

[11] In *Blum v. Int'l Ass'n of Machinists, supra* note 9, Mr. Justice Francis, writing for a three justice minority of the Supreme Court of New Jersey, recently re-emphasized the remarkably persuasive decisional premise of Mr. Justice Frankfurter in *Beauharnais.* Justice Francis wrote:

> "Libel is a crime at common law. It became such primarily because of its potentiality for incitement to violence and consequent breach of the peace. * * * [H]uman nature has not changed very much and the capacity of defamatory writings to incite violence remains with us. Therefore, I believe that if damage actions based on violence on the part of an employer or union are not considered withdrawn from the jurisdictional competence of the state courts, such actions based on libelous utterances on the part of either group, the tendency of which is to trigger violence, ought to be left to the state sovereignty as well. I can see nothing in the language of the Labor Management Relations Act which preempts the one and leaves us the other." 42 N.J. at —, 201 A.2d at 54-55.

See also Blackstone, Commentaries 813 (Gavit ed. 1941) ("The direct tendency of these libels is the breach of public peace, by stirring up the objects of them to revenge and perhaps to bloodshed.").

in the absence of a clear expression of congressional intent.[12] Our review of legislative history reveals no such express intent, nor can we find any such implicit necessity. We should especially protect the significant state interest where the "slight social value" of the utterances "as a step to truth" is so clearly out-weighed by countervailing, meaningful social interests.[13]

Nor would the forum provided by the NLRB adequately protect the state interest involved since libelous utterances may frequently be regarded as immaterial or insignificant in relation to the labor issues involved, and, therefore, may not motivate the NLRB to set aside an election. A deep-seated state interest should not be withdrawn from state jurisdiction by virtue of such extremely peripheral labor activity.[14]

---

[12] The maintenance of peace as a purpose of civil actions of libel has recently been recognized by the Supreme Court of the United States. *Garrison v. Louisiana*, — U.S. —, ——, 85 S. Ct. 209, 213 (1964). See also Emerson, "Toward a General Theory of the First Amendment," 72 Yale L.J. 877, 924 (1963).

The danger in libel is different from that nebulous danger involved where a state attempts to restrict one person's action because it may be generally disliked by another person. Cf. *Edwards v. South Carolina*, 372 U.S. 229, 83 S. Ct. 68 (1963). In a libel case the danger is real since, by defamation, one person literally attacks another's reputation. There is direct conflict and effrontery.

[13] In many respects, libelous use of material here is similar to a smear campaign in an election for public office. In either instance is there a purposeful social or public need to encourage such irrelevant and harmful activity by granting absolute protection against deliberate libel at the expense of fundamental state interests by withdrawing state jurisdiction so that intentional libel may be privileged and unrestrained. It is inconceivable that so vital a state interest should be destroyed and its citizens afforded no protection against intentional libel in the absence of clear congressional mandate to that effect.

[14] The extent to which such utterances are peripheral to Board concerns is illustrated by the complete insignificance of defamation, as such, in Board determinations to set aside elections.

(Continued on next page)

We have said that the activity involved in this case is peripheral to the labor dispute. In fact, in entertaining suits for libel, our courts deal with an interest completely different from that with which the NLRB deals. The NLRB is not interested in protecting reputation, or in deterring violence. Its concern is with insuring that an employee's right of free choice is not interfered with by coercion, falsehood or emotion.[15] On the other hand, the state jurisdiction is not directed at regulation of labor relations as such. The state concern is with injury to reputation and the discouragement of violent reprisals.[16] The fact that a labor dispute is involved in this case is really a fortuitous circumstance.[17] In our view, these factors are quite significant.

(Continued from preceding page)

"The Board has long made it clear that it will not 'police or censor propaganda used in the elections it conducts, but rather leaves to the good sense of the voters the appraisal of such matters, and to opposing parties the task of correcting inaccurate and untruthful statements.' Nevertheless, elections have been set aside 'because of material misrepresentations of fact where (1) the employees would tend to give particular weight to the misrepresentation because it came from a party that had special knowledge of, or was in an authoritative position to know, the true facts and (2) no other party had sufficient opportunity to correct the misrepresentation before the election.' " (Footnote omitted.) Bok, "The Regulation of Campaign Tactics in Representation Elections Under The National La bor Relations Act," 70 Harv. L. Rev. 38, 82 (1964).

[15] This accounts for the Board's policies set out by Bok, note 14 *supra*.

[16] It is in this respect that we believe that reliance which the court of appeals in *Linn v. United Plant Guard Workers*, *supra*, note 9, placed on *Local 100, United Ass'n of Journeymen v. Borden*, 373 U.S. 690, 83 S.Ct. 1423 (1963), and *Local 207, Int'l Ass'n of Bridge Workers v. Perko*, 373 U.S. 701, 83 S.Ct. 1429 (1963), is inapposite. In both these cases the state was attempting to protect a worker's interest in his job. This is obviously a matter of labor relations and is to be governed exclusively by federal law. In libel actions, however, the state is affording protection of a citizen's interest in his reputation. The fact that the reputation was injured in a labor dispute is merely incidental. In vindicating this compelling interest—an interest close to its police power—the state is not responding to considerations of labor policy at all.

[17] Cf. *DeVeau v. Baisted*, 363 U.S. 144, 80 S.Ct. 1146 (1960) (upholding state attempt to regulate crime on the waterfront even though choice of labor representatives affected).

The right of an individual to be protected against injury inflicted by false and damaging statements is so fundamentally within the traditional province of state concern and responsibility that extended emphasis and discussion appear unnecessary. Surely, state administration of justice should not be denied on the basis of an inference or an assumption. Less than convincing congressional direction is insufficient to deprive the state of its important jurisdiction to offer a peaceful forum for redress.

We are unable to find any congressional action or intention, express or implied, which limits the power of the state to make effective its long expressed public policy of according litigants a peaceful forum for protection against libel. Especially is this true where, as here, the allegation is made that the libel was deliberate, malicious and made with actual intent to harm.

It is also intriguing to note the consequences of the rule for which the defendants contend. Since the NLRB can offer no satisfactory redress to the individual for the harm caused in a labor controversy, participants in a labor dispute have, in effect, personal immunity from action for libel. Our federal constitution insures freedom of speech, yet it has always been held that freedom of speech is circumscribed by limits. Libel has traditionally been one of these limits. The furthest immunity from suits or prosecution for libel thus far granted is in regard to criticism made of governmental, public officials. See *New York Times v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710 (1964); *Garrison v. Louisiana,* ... U.S. ..., 85 S. Ct. 209 (1964). And even this rule does not apply where the defamation is made with actual malice. *Ibid.* Since actual malice is alleged in the instant case, the holding which defendants seek

would put them beyond even the pale of the *Times* ruling. We are not willing to grant to participants in labor disputes such absolute privileges on the basis of mere implication without any clear congressional indication—privileges which far outdistance a constitutional guarantee so jealously guarded and extended to its admissible social limit.

We recognize, of course, the guiding principle behind the doctrine of federal preemption: that where state and federal remedies may conflict and cause friction, the state jurisdiction must yield in the absence of a compelling state interest. A delicate balance exists between insuring effectuation of the federal policy embodied in congressional labor law and protecting permitted vital state interests. This is, of course, true where free speech in a labor dispute is involved. There is always some danger that criticism may be stifled if the balance is not precisely drawn, yet this is always true in placing defamation limitations on free speech. Abuses can be protected by the exercise of judicial authority. *Beauharnais v. Illinois, supra,* at 263-64, 72 S. Ct. at 734; *Salzhandler v. Caputo,* 316 F. 2d 445, 450 (2d Cir.), *cert. denied,* 375 U. S. 946, 84 S. Ct. 344 (1963).

Believing that a valid state interest which does not transgress federal policy exists in this defamation action, we conclude that state jurisdiction has not been withdrawn.

II

The trial court correctly dismissed defendants' preliminary objection which attacked plaintiffs' alleged failure to exhaust internal union remedies before seeking judicial relief. The court below held that plaintiffs' action for

defamation is subject to, and controllable by, the courts rather than the constitution or by-laws of the union. *Falsetti v. Local 2026, UMW,* 400 Pa. 145, 161 A. 2d 882 (1960), recognized that exceptions exist with respect to the rule regarding exhaustion of remedies and also recognized a relationship between that rule and the Labor Management Reporting and Disclosure Act of 1959. [18]

In *Salzhandler v. Caputo,* 316 F. 2d 445 (2d Cir.), *cert. denied,* 375 U.S. 946, 84 S. Ct. 344 (1963), the Labor Management Reporting and Disclosure Act of 1959 which protects freedom of expression for union members[19] was construed to prohibit union discipline with respect to a member who allegedly had made libelous statements about a union officer.[20] The union argued in support of its disciplinary sanctions, that "just as constitutionally protected speech does not include libelous utterances, *Beauharnais v. Illinois,* * * * [*supra*], the speech protected by the statute likewise does not include libel and slander." 316 F. 2d at 449. The court of appeals, however, distinguished *Beauharnais,* stating that the Supreme Court of the United States in that case had sustained the punishment of libel by courts and not by unions,[21] and held that although

---

[18] Act of September 14, 1959, 73 Stat. 519, §1 *et seq.*, 29 U.S.C.A. §401 *et seq.* (Supp. 1963).

[19] "Freedom of Speech and Assembly. Every member of any labor organization shall have the right to meet and assemble, freely with other members; and to express any views, arguments, or opinions * * *." Act of September 14, 1959, 73 Stat. 522, tit. I, §101(a)(2), 29 U.S.C.A. §411(a)(2) (Supp. 1963).

[20] "The Congress has decided that it is in the public interest that unions be democratically governed and toward that end that discussion should be free and untramleled and that reprisals within the union for the expression of views should be prohibited." *Salzhandler v. Caputo,* 316 F.2d 445, 451 (2d Cir.), *cert. denied,* 375 U.S. 946, 84 S.Ct. 344 (1963).

"libelous statements may be made the basis of civil suit between those concerned, the union may not subject a member to any disciplinary action on a finding by its governing board that such statements are libelous."[22] 316 F. 2d at 451. Among the exceptions noted in *Falsetti* is that a person will not be required to take intra-association appeals which cannot, in fact, yield remedies.[23] This exception is clearly applicable in the present case. This record is entirely free from even the slightest suggestion that any remedy—theoretical, taken, illusory or otherwise—is in

---

[21] In explaining the difference between court action and union action, the court of appeals said:

> "In *Beauharnais*, the Supreme Court recognized the possibility that state action might stifle criticism under the guise of punishing libel. However, because it felt that abuses could be prevented by the exercise of judicial authority, * * * the court sustained a state criminal libel statute. But the union is not a political unit to whose disinterested tribunals an alleged defamer can look for an impartial review of his 'crime'. It is an economic action group, the success of which depends in large measure on a unity of purpose and sense of solidarity among its members.
>
> "The [union] Trial Board in the instant case consisted of union officials, not judges. It was a group to which the delicate problems of truth or falsehood, privelege, and 'fair comment' were not familiar. Its procedure is peculiarly unsuited for drawing the fine line between criticism and defamation * * *." (Footnote omitted.) 316 F.2d at 449-50.

[22] "In reaching such a result the court could have further supported its reasoning by analogy to those obscenity cases in which a statute is struck down, not because the substantive standards are unconstitutional, but because initial administration of the standards is entrusted to a lay tribunal with insufficient concern for first amendments rights." (Footnote omitted.) 77 Harv. L. Rev. 770, 771 (1964).

[23] A similar conclusion was also reached, but for different reasons, in *Preveden v. Croatian Fraternal Union*, 120 F. Supp. 33 (W.D. Pa. 1954). The court there held that a member was not required to exhaust remedies provided by a fraternal union prior to bringing action for defamation.

any manner available or provided by any internal union procedure.

Order affirmed.

Mr. Justice Musmanno dissents.

Mr. Justice Cohen files a dissenting opinion.

DISSENTING OPINION

(Filed January 5, 1965)

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

~~Nos. 269, 272 January Term, 1964~~

CHARLES MEYER, et al. v. JOINT COUNCIL 53, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, et al., *Appellants.*	Appeals from the Order of the Court of Common Pleas No. 5 (Heard in C.P. No. 6) of the County of Philadelphia, as of June Term, 1963.

COHEN, J.

In view of the lack of authority for the proposition that the state's interest in defamation is as great as the state's interest in physical violence, I prefer to follow the well reasoned federal and state authorities to the effect that state-based actions for defamation arising out of a labor dispute are precluded, because regulation of the conduct in question is subject to the exclusive primary jurisdiction of the National Labor Relations Board over unfair labor practices and representation elections. *Linn v. United Plant Guard Workers,* 337 F. 2d 68 (6th Cir. 1964); *Blum v. In't Ass'n of Machinists,* 42 N.J. 389, 201 A. 2d 46 (1964); *Hill v. Moe,* 367 P. 2d 739 (Sup. Ct. Alaska (1961); cert. den., 370 U.S. 916 (1962); *Warehouse & Produce*

Workers Local 559, IBT v. United States Gypsum Co., 50 CCH Lab. Cas. 19,196 (Super. Ct. Wash. 1963); *Schnell Tool & Die Corp. v. United Steelworkers*, 200 N.E. 2d 727 (Ohio C.P. 1964). These cases are clearly within the spirit of the recent United States Supreme Court pronouncements on preemption of state tort actions arising out of labor disputes. See *Iron Workers Union v. Perko*, 373 U.S. 701 (1963) and *Local 100, United Association of Journeymen v. Borden*, 373 U. S. 690 (1963).

While the reputation and character of employees and employers may not be the primary concern of the NLRB in defining the area of permissible speech in labor disputes, it is patent that the development of fifty state laws of defamation cannot adequately deal with the needs of free flow of communication in such disputes. The Commonwealth's interest in defamation in the course of labor disputes is not great enough to warrant submersion of the vital need for uniformity of federal regulation of labor relations. This is not merely a case of the Commonwealth's interest colliding with that of the federal government, for it is the Commonwealth, like all states, that reaps the benefit of sound labor relations.

Accordingly, I dissent.

Supreme Court [illegible]

October Term, [illegible]

No. [redacted] 85

WILLIAM C. LINN,
Petitioner,

vs.

UNITED PLANT GUARD WORKERS OF AMERICA,
LOCAL 114, a Labor Association,
LEO J. DOYLE, [illegible],
and W. T. ENGLAND,
Jointly and Severally,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

HAROLD [illegible], ESQ.,
Counsel for Respondents, United Plant
Guard Workers of America, Local
114, [illegible]
England,
3142 First National Building,
Detroit, Michigan [illegible]

WINSTON L. LIVINGSTON, ESQ.
NANCY JEAN VAN LOPIK,
Of Counsel.

[illegible] Co., [illegible], Michigan

SUBJECT INDEX

TABLE OF CASES AND AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 819

WILLIAM C. LINN,
Petitioner,
vs.
UNITED PLANT GUARD WORKERS OF AMERICA,
LOCAL 114, a Labor Association,
LEO J. DOYLE, BENTON I. BILBREY
and W. T. ENGLAND,
Jointly and Severally,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

United Plant Guard Workers of America, Local 114, a labor organization, Benton I. Bilbrey and W. T. England, some of the respondents herein, oppose the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on October 13, 1964.

STATEMENT OF QUESTION PRESENTED

Does a state or federal court have jurisdiction over the subject matter of a civil action for libel where such action is based upon activities which are arguably subject to Section 7 or Section 8 of the National Labor Relations Act, as amended?

STATEMENT

The statement of the case contained in petitioner's brief is substantially correct except for the paraphrasing of the opinion of the Court of Appeals contained at its conclusion and except for the omission of the following facts which these respondents deem material.

From about the first of November, 1962 to at least the date this suit was commenced, United Plant Guard Workers of America, Local 114, had been engaged in an organizational drive in the Detroit area among the employees of Pinkerton's National Detective Agency, Inc., petitioner's employer (R 11a, 3a).*

The alleged false and defamatory matter allegedly published on or about December 7, 1962 was set forth in Counts I and II of the complaint, as follows:

> "(7) Now we find out that Pinkerton's has had a large volume of work in Saginaw they have had it for years.
>
> United Plant Guard Workers now has evidence,
>
> A. That Pinkerton has 10 jobs in Saginaw, Michigan.

---

* "R" refers to the appendix to the petitioner's brief filed in the Court of Appeals.

B. Employing 52 men.

C. Some of these jobs are 10 years old!

(8) Make you feel kind sick & foolish.

(9) The men in Saginaw were deprived of their *right* to VOTE in three N.L.R.B. elections. Their names were not summitted (sic). These guards were voted into the Union in 1959! These Pinkerton guards were *robbed* of pay increases. The Pinkerton manegers (sic) were LYING to us—all the time the contract was in effect.

No doubt the Saginaw men will file criminal charges.

Somebody may go to Jail!" (R 4a, 5a, 6a)

In Count I, petitioner alleged that he "is and was one of the managers referred to by defendants" (R 5a). In Count II, petitioner alleged that he "is specifically named elsewhere in the publication as one of the managers referred to in the words and material quoted immediately above" (R 6a).

On December 11, 1962, petitioner's employer filed with the Detroit office of the National Labor Relations Board a charge against United Plant Guard Workers of America (Ind.) Local 114 based upon the same activities described in petitioner's complaint (R 18a, 12a). After an investigation the Acting Regional Director refused to issue a complaint stating:

"The basis for refusing to proceed in this matter is as follows:

"The above-mentioned charge against United Plant Guard Workers of America, Local 114, was based upon four allegedly objectionable leaflets prepared and circulated by an employee of your company. Such employee was not an officer or member of the charged union, nor was there any evidence that he was acting as an agent of such union. There

> is no evidence that the union was involved in any respect in the drafting and circulation of the leaflets. In view of the fact that the union is not responsible for the distribution of said leaflets, the charge against the union is wholly without basis." (R 23a, 24a)

The Office of the General Counsel sustained the ruling of the Regional Director on the same grounds (R 37a).

ARGUMENT

I.

THE DECISION BELOW IS CLEARLY CORRECT

The activities complained of in this action are arguably subject to Section 7 or Section 8 of the National Labor Relations Act, as amended (29 U.S.C. §§157, 158, 61 Stat. 140), hereinafter referred to as the "Act".

The general rule with respect to the exercise of jurisdiction by state or federal courts over such activities was stated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) as follows:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield (p. 244).
>
> * * * * *
>
> "When an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted" (p. 245).

The sole exception to this general rule was stated in *Garmon* itself as follows:

> "It is true that we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. *United Automobile Workers v. Russell,* 356 U.S. 634; *United Construction Workers v. Laburnum Corp.,* 347 U.S. 656. We have also allowed the States to enjoin such conduct. *Youngdahl v. Rainfair,* 355 U.S. 131; *Auto Workers v. Wisconsin Board,* 351 U.S. 266. State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction" (p. 247).

That violence or threats of violence were the sole basis for the exercise of jurisdiction by state courts in such cases was emphasized in the footnotes to Justice Frankfurter's majority opinion in *Garmon.* Discussing *United Construction Workers v. Laburnum,* 347 U.S. 656, he said:

> "Throughout, the opinion of the Court makes it clear that the holding in favor of state jurisdiction was limited to a situation involving violence and threats of violence" (fn. 6, p. 248).

In the same footnote, he stated:

> "In *Russell* we again allowed the State to award damages for injuries caused by 'mass picketing and threats of violence, * * *' 356 U.S. at 638. That opinion also continually stresses the violent nature of the conduct and limits its decision to the 'kind of tortious conduct' there involved" (fn. 6, p. 249).

Both the district court and the court of appeals held that the *Garmon* decision controlled the present case and since

there was no violence or threat of violence, the court was precluded from exercising jurisdiction.

Most of the other courts before which the same question has been raised have similarly concluded that state or federal courts have no jurisdiction over libel suits arising out of union organizational activity or contract negotiations. *Blum v. International Association of Machinists,* 80 N.J. Super. 37 (1963), affirmed 42 N.J. 389, 201 A 2d 46 (1964); *Hill v. Moe* (Alaska Sup. Ct. 1961), 367 P 2d 739, cert. den. 370 U.S. 916 (1962); *Schnell Tool & Die Corp. v. United Steelworkers* (Ohio C. P. 1964), 200 N.E. 2d 727; *Warehouse and Produce Workers Local 599, I.B.T. v. United States Gypsum Co.* (Wash. Super. Ct. 1963), 56 LRRM 2829; 50 CCH Lab. Cas. 19, 196; *Troidl v. Keough* (N.Y. Sup. Ct. 1964), 254 N.Y.S. 2d 240; *Inland Air Conditioning v. Bergan* (Cal. Super. Ct., Riverside Co., 1964), 57 LRRM 2296.

The decision to the contrary relied upon by petitioner is the recent decision of the Supreme Court of Pennsylvania in *Meyer, et al. v. Joint Council 53, International Brotherhood of Teamsters,* — Pa. —, 206 A 2d 382 (1964).

To reach the conclusion that a state court had jurisdiction over the subject matter of a libel suit arising out of a union organizing campaign, the Pennsylvania court expressly rejected the language of *Garmon,* saying in a footnote with reference to the present case:

> "The theory on which this holding was predicated was that under Garmon only violence or the threat of violence would permit the exercise of such jurisdiction. We cannot agree that the language used in Garmon justifies such a narrow interpretation of the area of jurisdiction left to the state and federal courts" (206 A 2d at 385).

Having rejected the clear rule of *Garmon*, the Pennsylvania court found it had jurisdiction because libelous words had a *tendency* to cause a breach of the peace. There was, therefore, a compelling state interest, especially in the maintenance of domestic peace upon which state jurisdiction over a libel suit could be predicated.

The Pennsylvania court also indicated its belief that libelous utterances were an "extremely peripheral labor activity" (206 A. 2d at 387). This, too, was answered by *Garmon*. If the activity is arguably subject to Section 7 or 8 of the Act, it is *not* peripheral.

Respondents submit that the Pennsylvania court erred in rejecting *Garmon*. Moreover, it committed serious error in its attempt to create another exception to *Garmon*. If the test upon which state jurisdiction is to be determined is whether an activity arguably subject to Section 7 or Section 8 of the Act has a tendency to cause a breach of the peace, the entire *Garmon* rule will be destroyed. Because of the nature of such activities and the realistic consideration that labor-management relations are often close to violence, the proposed exception could wipe out the general rule.

For the above reasons, the respondents believe the decision below is clearly correct.

II.

THERE IS NO CONFLICT OF DECISIONS BETWEEN COURTS OF APPEAL

Petitioner asserts that *Bouligny, Inc. v. United Steelworkers of America, AFL-CIO* (4th Cir. 1964), 336 F 2d 160, holds that a state court has jurisdiction over a suit for libel although the defendant's activities may be arguably subject to Section 7 or Section 8 of the National Labor Relations Act.

An examination of this case discloses that the court merely held that the fact the libel was committed during an organizing campaign was insufficient to convert a common law tort into a federal question. The cause was remanded to the state court in which it was commenced. It does not appear that the pre-emption question was raised or considered by the court in reaching its decision. A ruling on this question was unnecessary to the decision of the court.

To assert that the decision of the Court of Appeals for the Sixth Circuit in the present case conflicts with the decision in the *Bouligny* case, *supra*, requires substantial and unwarranted interpolation of the latter decision.

III.

THE SUPREME COURT HAS ALREADY DECIDED THE QUESTION PRESENTED

Respondents believe that the question presented in the petition for certiorari herein has already been decided by this Court in the case of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), discussed *supra*, and that there is no reason for a reconsideration of such decision.

The *Garmon* case was re-affirmed by this Court in *Local 438, Construction and General Laborers v. Curry*, 371 U.S. 542 (1963) in which it was held that a Georgia court had no jurisdiction to enjoin picketing which was at least an arguable violation of Section 8(b) of the Act; the National Labor Relations Board was said to have exclusive jurisdiction.

Again, in *Local 100, United Association of Journeymen and Apprentices v. Borden*, 373 U.S. 690 (1963) and *Local 207, International Association of Bridge Workers v. Perko*, 373 U.S. 701 (1963), it was held that state courts lacked jurisdiction of union members' damage actions against their unions for refusal to refer a member to a job and for causing a discharge and preventing subsequent employment of a member. Since the unions' conduct was arguably subject to Section 8 of the Act, it was within the exclusive jurisdiction of the Board.

The purpose of the *Garmon* rule was to avert the danger of state interference with national policy. As was stated in *Garmon*, at page 246:

> "The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict, with national labor policy."

No one has disputed the soundness of the general rule or the validity of its purpose. The *sole* exception was founded on the compelling state interest in preserving domestic peace where there was actual violence or a threat of violence. Further exceptions based upon a tendency to violence or the nature of the injury suffered would not only increase the danger of interference with national labor policy, but might make the rule of *Garmon* so difficult to apply that it would become meaningless.

From *Hill v. Florida*, 325 U.S. 538 in 1945 to *Garmon, supra*, in 1959, was a long and weary way. The question as to the extent of federal pre-emption in the field of labor-management relations, and particularly the extent to which the original jurisdiction of the National Labor Relations Board is exclusive, sorely perplexed bench and bar. This question was certainly the subject of innumerable arguments and briefs in lower courts, both state and federal, in cases which were never appealed and therefore never reported. The search for a workable formulation by which bench and bar could be guided with reasonable certainty appears to have ended with *Garmon*.

Now to weaken the authority of that case on the dubious proposition that a defamatory statement by a union protagonist concerning an employer, published in the heat of an organizing campaign, where the alleged defamatory statement itself relates to the employer's alleged conduct in the area of labor relations, "tends to create violence" would be a regrettable retreat from certainty to doubt. The flood gates would open again to endless litigation over the respective areas of state and federal jurisdiction in every case in which the fertile imagination of an advocate could persuasively depict a "tendency" of particular conduct to create a situation within state jurisdiction as defined in *Garmon*.

It is true that there will be cases, such as this, in which the remedies of an individual may be curtailed. That this would happen was also recognized in *Garmon* when it was stated at pages 246, 247:

> "Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventative

> relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme."

This case, in fact, illustrates the validity of the *Garmon* rule. The alleged defamatory material affected petitioner solely in his capacity as a manager of Pinkerton's National Detective Agency, Inc., and it was directly related to the union's organizing efforts. The National Labor Relations Board has investigated the matter and made a determination that these respondents were not responsible for the defamatory material. This determination was made after careful investigation by an administrative agency "armed with its own procedures, and equipped with its specialized knowledge and cumulative experience" (*San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 242 [1959]).

The problems between Pinkerton's and these respondents, arising out of the activities involved in this case have been resolved. If petitioner is permitted to maintain this action, the relations between his employer and these respondents would become more strained, thus hindering the national labor policy. If a jury were to find these respondents responsible for the defamatory material, the prestige and processes of the National Labor Relations Board would be seriously undermined.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

HAROLD A. CRANEFIELD, ESQ.,
Counsel for Respondents United Plant Guard Workers of America, Local 114, Benton I. Bilbrey and W. T. England,
2142 First National Building,
Detroit, Michigan 48226.

WINSTON L. LIVINGSTON, ESQ.,
NANCY JEAN VAN LOPIK,
Of Counsel.

Dated: April 2, 1965.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 819

WILLIAM C. LINN, PETITIONER

v.

UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 114, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted in response to the Court's invitation of March 8, 1965.

The question presented is whether the National Labor Relations Act bars the maintenance of a libel action instituted under State law by an official of an employer subject to the Act, seeking damages for defamatory statements made during a union organizing campaign by the union and its officers with alleged knowledge that the statements were false. The court of appeals held that under *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 245, the subject matter of the complaint was "arguably subject" to, and therefore preempted by, the

National Labor Relations Act, and that the district court properly dismissed the complaint.

We submit that this is an important question which this Court should decide, and we therefore urge that the petition be granted. We shall merely summarize some of the pertinent arguments and policy considerations involved, but without attempting to suggest the answers. If certiorari is granted, we shall file a comprehensive brief.

1. The rationale of the preemption doctrine formulated in *Garmon*—that "[w]hen an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board" (359 U.S. at 245)—is that such deferral is necessary "if the danger of state interference with national policy is to be averted" (*ibid*). "To leave the States free to regulate" "activities which * * * are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8 * * * involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. * * * [T]o allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes" (p. 244).

The Court further recognized, however, that the National Labor Relations Act had not withdrawn regulatory power from the States "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence

of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act" (p. 244). The Court cited for the latter proposition its decisions which upheld the authority of the States to grant relief for tortious conduct that was "marked by violence and imminent threats to the public order" (p. 247).

The present case requires a reconciliation and accommodation of these conflicting policies. Defamatory statements made during a labor dispute ordinarily would not, of themselves, constitute an unfair labor practice under § 8 of the Act, and the Board normally would neither have occasion to determine that question nor ability to provide any effective remedy therefor. On the other hand, certain opprobrious words which State law might consider defamatory may be so commonly employed in labor disputes as to make it appropriate to treat their utterance as a protected activity under § 7, which guarantees to employees "the right to self-organization * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The theory would have to be that employees and their representatives would be deterred from speaking freely, and hence from exercising to the fullest their right to engage in concerted activities, if they were subject to possible liability should their words be held defamatory under the varying standards of State law. Cf. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 277–279; *Barr* v. *Matteo,* 360 U.S. 564, 571–572.

On the other hand, it can be argued that such an expansive interpretation of Section 7 would go considerably beyond any demonstrated need for federal protection or other specific evidence of congressional intent. While the phrase "concerted activities" in Section 7 was designed to protect employees against the harmful effects of the doctrine that concerted activities were conspiracies and for that reason unlawful (*Auto Workers* v. *Wisconsin Employment Relations Board,* 336 U.S. 245, 257–258), one may well question whether there was ever any intent to relieve employees from normal duties not to violate the rights of others which are uniformly applied to all persons under the law of torts, whether or not they are engaged in organizational activities or a labor dispute. Certainly there is nothing affirmative in the language, legislative history or policy of the Act that indicates any clear congressional intention to confer upon employers or employees a broader federal privilege than the normal State law of defamation accords.

2. If Section 7 protects statements which would be defamatory under State law, then the federal right must prevail as a matter of substantive law. It does not necessarily follow, however, that the State courts are ousted of jurisdiction. As we have noted, defamation is a subject of traditional State concern that touches closely upon local interests. If the States are denied jurisdiction in situations where the language is arguably protected by Section 7, unprivileged injuries to reputation will be left without relief. The Board cannot award damages for defa-

mation. A cease and desist order, even when enforced by injunction, gives the victim no redress for the injury already suffered. The familiar precept that a State tribunal has no jurisdiction where the conduct with which the defendant is charged is arguably protected or arguably prohibited by the National Labor Relations Act, is subject to exceptions in cases involving violence,[1] interference with membership rights,[2] and breach of contract.[3] Furthermore, the precept rests primarily upon the need to avoid disturbing the delicate balance struck by Congress as a matter of national labor policy in determining what conduct should be regulated and what should be free. Compare *Teamsters Union* v. *Morton,* 377 U.S. 252, 259–261. "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits" (*Garner* v. *Teamsters, Chauffeurs & Helpers Local Union No. 776,* 346 U.S. 485, 499–500). When one is dealing with laws designed to regulate labor-management relations as such, the zone delimited by what is arguably protected or prohibited marks the area in which the failure of Congress to act fairly gives

[1] *United Automobile Workers* v. *Russell*, 356 U.S. 634; *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131; *United Automobile Workers* v. *Wisconsin Board*, 351 U.S. 266; *United Construction Workers* v. *Laburnum Corp.*, 347 U.S. 656.

[2] *Machinists* v. *Gonzales*, 356 U.S. 617.

[3] *Smith* v. *Evening News Association*, 371 U.S. 195; *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261.

rise to the inference that Congress determined to leave the parties to their own devices, unprotected and uninhibited. Such an inference might well be thought to carry little force, however, with respect to rules of tort liability which normally apply to all members of the community alike and involve no special appraisal of the conflicting interests of management, labor and the public in union organization and labor disputes. Cf. Cox, *Federalism in the Law of Labor Relations*, 67 Harv. L. Rev. 1297, 1321 *et. seq.*

3. The issue raised by the petition for certiorari in the present case appears to be arising with increasing frequency[4] and is, in our judgment, sufficiently vexing to warrant a decision by this Court.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
STEPHEN B. GOLDBERG,
LAURENCE S. GOLD,
Attorneys,
National Labor Relations Board.

APRIL 1965.

[4] See, *e.g.*, *Blum* v. *International Association of Machinists*, 42 N.J. 389, 201 A. 2d 46; *Hill* v. *Moe*, 367 P. 2d 739 (Sup. Ct. Alaska), certiorari denied, 370 U.S. 916; *Meyer* v. *Joint Council 53, Teamsters*, 58 LRRM 2183, (Sup. Ct. Pa.); *Oss* v. *Birmingham*, 58 LRRM 2754 (Sup. Ct. Arizona).

U.S. GOVERNMENT PRINTING OFFICE : 1965

FILE COPY

Office Supreme Court, U.S.
FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 45

WILLIAM C. LINN,
Petitioner,
vs.
UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 114, a Labor Association, LEO J. DOYLE, BENTON I. BILBREY and W. T. ENGLAND, Jointly and Severally,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BY RESPONDENTS TO MEMORANDUM FOR UNITED STATES

HAROLD A. CRANEFIELD, ESQ.,
Counsel for Respondents United Plant Guard Workers of America, Local 114, Benton I. Bilbrey and W. T. England,
2142 First National Building,
Detroit, Michigan 48226.

WINSTON L. LIVINGSTON, ESQ.,
NANCY JEAN VAN LOPIK,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 819

WILLIAM C. LINN,
Petitioner,
vs.
UNITED PLANT GUARD WORKERS OF AMERICA,
LOCAL 114, a Labor Association,
LEO J. DOYLE, BENTON I. BILBREY and
W. T. ENGLAND, Jointly and Severally,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BY RESPONDENTS TO MEMORANDUM FOR UNITED STATES

Respondents respectfully suggest with reference to the Memorandum for the United States:

1. Section 1 speaks, as does the Petition, in general terms of defamation. In Respondents' Brief in Opposition, the text of the language complained of is set forth in full. Respondents deem it of great significance in this case that the alleged defamation imputed criminal conduct to the

petitioner only in his capacity as an employer and with reference to his manner of conducting labor relations.

2. Respondents are puzzled by Section 2 of the Memorandum.

In this Section of its Memorandum, the Government suggests, in support of the Petition for Certiorari, that the alleged defamation was arguably protected by Section 7 of the National Labor Relations Act, rather than arguably prohibited. Indeed, the Solicitor General says that it would not "ordinarily" be an unfair labor practice.

The Government then suggests that it does not necessarily follow that State courts are ousted of jurisdiction and cites decisions of this Court creating three areas of exception to the rule of *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959).

But, if in fact such activity is *protected*, a State court could only dismiss an action designed to interfere with this protected activity.

Moreover, in the cases cited as creating exceptions to *Garmon*, the defendant resisted state court jurisdiction on the ground that the conduct attributed to them, which was the subject matter of the complaint, was *prohibited* by the Act. Respondents are unaware of any exception to *Garmon* where the defendant's conduct is *protected* by Section 7 as the Government appears to argue here.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

HAROLD A. CRANEFIELD, ESQ.,
Counsel for Respondents United Plant Guard Workers of America, Local 114, Benton I. Bilbrey and W. T. England,
2142 First National Building,
Detroit, Michigan 48226.

WINSTON L. LIVINGSTON, ESQ.,
NANCY JEAN VAN LOPIK,
Of Counsel.

Dated: May 4, 1965.

INDEX

785-948—65——1

CITATIONS

Cases:

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 45

WILLIAM C. LINN, PETITIONER

v.

UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 114, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

In our memorandum filed in response to the Court's invitation to express the views of the United States as to whether the petition for certiorari should be granted (380 U.S. 930), we urged the Court to review the case and stated that we would file a comprehensive brief if certiorari was granted.

OPINIONS BELOW

The opinion of the district court (R. 35) is unreported. The opinion of the court of appeals (R. 40) is reported at 337 F. 2d 68.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 1964 (R. 46). The petition for certiorari was filed on January 9, 1965, and granted on May 24, 1965 (R. 47; 381 U.S. 923). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Act bars the maintenance of a civil action for libel instituted under State law by an official of an employer subject to the Act, seeking damages for defamatory statements made during a union organizing campaign by the union and its officers allegedly with knowledge that the statements were false.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in Appendix A (pp. 53–54, *infra*).

STATEMENT

On December 17, 1962, petitioner Linn, assistant general manager of the North Central Region of Pinkerton's National Detective Agency, Inc., filed a complaint in the United States District Court for the Eastern District of Michigan against the United Plant Guard Workers of America, Local 114, its president, its vice-president, and a Pinkerton employee, Leo J. Doyle. The complaint alleged that, during a campaign to organize Pinkerton's employees in Detroit, the defendants had circulated

among those employees leaflets which stated the following:

> (7) Now we find out that Pinkerton's has had a large volume of work in Saginaw they have had it for years.
>
> United Plant Guard Workers now has evidence.
>
> A. That Pinkerton has 10 jobs in Saginaw, Michigan.
>
> B. Employing 52 men.
>
> C. Some of these jobs are 10 yrs. old!
>
> (8) Making you feel kind sick & foolish.
>
> (9) The men in Saginaw were deprived of their *right* to *vote* in three N.L.R.B. elections. Their names were not summitted (sic). These guards were voted into the Union in 1959! These Pinkerton guards were *robbed* of pay increases. The Pinkerton managers (sic) were *lying* to us—all the time the contract was in effect. No doubt the Saginaw men will file criminal charges. Somebody may go to Jail! [R. 4–5; emphasis in original.]

The complaint further alleged (R. 5) that plaintiff was one of the managers referred to in this material, and that defendant thereby meant, and intended for the readers thereof to understand, that:

> * * * plaintiff had deliberately lied to part or all of Pinkerton plant guard employees; that plaintiff had lied and/or deliberately falsified information required of him to be submitted to the National Labor Relations Board; that plaintiff had lied to or deliberately misled Pinkerton employees concerning a prior Union

785-948—65——2

> contract; that plaintiff had deliberately withheld from Pinkerton employees wages earned through pay increases; that plaintiff had committed certain criminal acts for which he would be prosecuted.

Finally, the complaint alleged (R. 5) that all the foregoing was "wholly false, defamatory and untrue," and that this was known to defendants. It also asserted that the statements were libelous *per se*. Damages in the amount of $500,000 were claimed (R. 7), and the complaint was later amended to increase the damage claim to $1,000,000 (R. 39). The only basis of federal jurisdiction alleged in the complaint was diversity of citizenship (R. 3).

All of the defendants except Doyle moved to dismiss the complaint on the ground (among others) that the matter was within the exclusive jurisdiction of the National Labor Relations Board (R. 8). An affidavit and other documents attached to the motion to dismiss disclosed that prior to the filing of the complaint Pinkerton's had filed unfair labor practice charges with the Regional Director of the National Labor Relations Board, alleging that the distribution by the Union of the leaflet described above, as well as three other such leaflets, restrained and coerced Pinkerton's employees in the exercise of their Section 7 rights in violation of Section 8(b)(1)(A) (see R. 8–9, 35–36).[1] The Regional Director had declined to issue a complaint, however, stating:

> The above-mentioned charge against United Plant Guard Workers of America, Local 114,

[1] *United Plant Guard Workers of America, Local 114 (Pinkertons National Detective Agency, Inc.)*, 7–CB–1008.

> was based upon four allegedly objectionable leaflets prepared and circulated by an employee of your company. Such employee was not an officer or member of the charged union, nor was there any evidence that he was acting as an agent of such union. There is no evidence that the union was involved in any respect in the drafting and circulation of the leaflets. In view of the fact that the union is not responsible for the distribution of said leaflets, the charge against the union is wholly without basis. [R. 22–23.]

And on appeal from the Regional Director's ruling, the General Counsel of the Board had on February 13, 1963, sustained his ruling on the same grounds (R. 34).

On June 15, 1963, the district court dismissed the complaint as to the Union, its president and its vice-president, on the ground that even if the Union was responsible for distributing the material in question, "this would arguably constitute an unfair labor practice under Section 8(b)" of the National Labor Relations Act, and that in these circumstances this Court's decision in *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, *infra,* pp. 14–17, compelled a dismissal on preemption grounds[2] (R. 36). On appeal, the Sixth Circuit affirmed. It assumed, for purposes of decision, that the statements in question were "false, malicious, clearly libelous and damaging to plaintiff Linn, albeit they were relevant to the

[2] Defendant Doyle did not move for dismissal of the action as to him. Presumably, this part of the case is still before the district court.

union's campaign" (R. 41). But it read *Garmon*, as had the district court, to bar the States from granting relief [3] where, as in the instant case, the conduct complained of arguably violated the National Labor Relations Act. The court noted, however, that its decision was "limited to a suit for libelous statements growing out of and relevant to a union's campaign to organize the employees of an employer subject to the National Labor Relations Act" (R. 46).

ARGUMENT

INTRODUCTION AND SUMMARY

This case presents a difficult question of increasing practical importance in the administration of the federal labor laws. It is whether and to what extent the comprehensive scheme of federal regulation of labor relations embodied in the National Labor Relations Act of 1935 and subsequent amendatory legislation should be deemed to have superseded the remedies provided by State law for defamations made during labor disputes in industries subject to the Act. Two competing interests, both substantial, are involved in this question. The first is the interest in maintaining the integrity, the efficacy, and the uniformity of the national policy which Congress has laid down to govern labor disputes affecting interstate commerce. The second is the traditional concern and responsibility of the States to protect their citizens against the damage to reputation

[3] Since the only basis of federal jurisdiction alleged was diversity of citizenship (see p. 4, *supra*), any relief granted would have to be predicated on State law, in this case the law of Michigan where the alleged defamation occurred. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64.

which results when immoral, unethical or criminal conduct is falsely imputed to an individual. Nowhere in the language or the legislative history of the Act has Congress said how these interests are to be reconciled. It therefore devolves upon this Court to work out a solution that will effectuate the purposes and design of the federal regulatory scheme without unduly hindering the States in the discharge of their legitimate and substantial responsibilities.

The specific question presented, difficult and important in its own right, is also significant for the light it sheds on the recurrent general problem of federalism presented by State intervention in labor disputes subject to the federal regulatory scheme. In our role as *amicus curiae,* we attempt to develop an analytical framework that may be useful to the Court in dealing with the larger problem whether or not the particular conclusions we reach are accepted. We begin our analysis with a review of the applicable legal principles and general standards which emerge from the decisions of this Court culminating in *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236. We show that these decisions establish that the National Labor Relations Act occupies the field of labor relations, thereby precluding (with certain express statutory exceptions not relevant here) State action that is specifically intended to regulate such relations, or rests upon an appraisal of the conflicting interests of management, labor and the public in union organization and labor disputes, or otherwise encroaches directly on the area of conduct and interests comprehensively regulated by the Act; but that the de-

cisions leave open the question of State power to enforce against the parties to such disputes laws intended, rather, for the protection of substantial interests within the primary responsibility of the States—for example, the interest in domestic peace and order, and the interest in the protection of an individual's reputation. Therefore, the present case raises an essentially novel issue as to which the prior decisions are not controlling. The courts below erred in concluding that the complaint must be dismissed on the authority of *Garmon*.

We argue, next, that State action of the latter type (such as providing remedies for defamation) should be deemed superseded only when there is a clear danger of palpable conflict with the objectives of the federal labor laws—and then only to the extent clearly necessary to eliminate the conflict. We then undertake to examine the practical consequences of two extreme positions which might be taken on the question presented. The first is that State laws of defamation are wholly unaffected by the federal scheme, and that suits for defamation arising out of labor disputes subject to the federal laws may be maintained precisely as in any other context (the position of the Supreme Court of Pennsylvania in the *Meyer* case, petitions for certiorari pending, see n. 12, p. 50, *infra*). The second is that all such suits are barred (the position of the courts below in the instant case). We show that the first of these alternatives is unacceptable because the application of the conventional principles of defamation in the context (where the problem is most likely to arise) of a campaign to determine who

shall be the exclusive collective bargaining agent for the workers in a particular plant or other bargaining unit could appreciably limit the free exchange of views and opinions which federal law is intended to encourage in such campaigns, and which Section 7 of the National Labor Relations Act expressly protects; and could also provide employers, in areas where local feeling is hostile to union-organizing efforts, with a potent weapon for deterring such efforts through defamation suits seeking heavy damages for trivial exaggerations or distortions made by union adherents. These results would disturb the balance between labor and management sought to be struck by the federal scheme. But the opposite extreme—barring all defamation actions arising from labor disputes affecting interstate commerce, regardless of the nature and consequences of the alleged defamation—is also unsatisfactory. It would leave the individual completely without remedy even for substantial injury inflicted by malicious, utterly untruthful, and very damaging statements about his character made in the course of a labor dispute. Surely no such result was intended by Congress when it enacted the National Labor Relations Act, and we show that no such result is necessary to protect the integrity and effectuate the policies of the Act.

After analyzing and rejecting these extreme alternatives, we propose a middle ground persuasively supported by analogy from other applications of federal policy to limit defamation actions, especially this Court's decision in the *Times* libel case (*New York Times Co.* v. *Sullivan,* 376 U.S. 254). We show that

a reasonable accommodation of the competing interests, which minimizes conflict with the federal scheme while leaving the States adequate authority to protect the interest in reputation of their citizens, is to construe the National Labor Relations Act as barring the maintenance of such an action where the defendant establishes either that he did not make the alleged defamation with "actual malice" or that the defamation was not a "grave" one, as we define those terms. This two-pronged test corresponds to that the Labor Board applies in determining whether allegedly defamatory matter is within the broad scope of the Section 7 protected right of employees to engage in concerted activity related to union organizing and collective bargaining.

I

THE QUESTION PRESENTED IS NOT CONTROLLED, AS THE LOWER COURT BELIEVED, BY THE "PREEMPTION" DECISIONS OF THIS COURT

A. THIS COURT HAS ONLY BARRED STATE ACTION DIRECTLY REGULATING LABOR RELATIONS

In a series of early decisions, this Court held that the States could not interfere with the exercise of rights protected by the National Labor Relations Act. See *Hill* v. *Florida*, 325 U.S. 538; *International Union of United Automobile Workers* v. *O'Brien*, 339 U.S. 454; *Amalgamated Assn.* v. *Wisconsin Board*, 340 U.S. 383. Then in its landmark decision in *Garner* v. *Teamsters Union*, 346 U.S. 485, the Court held that the States were also barred from extending their "own form of relief" (*id.* at 489) for

practices proscribed under the Act, and hence that a State labor relations law (patterned after the federal Act) could not be used to enjoin picketing which was alleged to be coercive, and which, if the allegations of the complaint were true, was also a federal unfair labor practice. The Court noted that Congress had done more than "merely lay down a substantive rule of law to be enforced by any [competent] tribunal"; it had gone on "to confide primary interpretation and application of its rules to a specific and specially constituted tribunal * * *. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies" (*id.* at 490). Pointing out that in fact the State labor law under which the action had been brought, like the federal law, appeared to create public rather than private rights, the Court stated that, in any event, "[t]he conflict lies in remedies, not rights. The same picketing may injure both public and private rights. But when two separate remedies are brought to bear on the same activity, a conflict is imminent" (*id.* at 498–499). Moreover, "[t]he detailed prescription [in the federal Act] of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. * * * For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing

free for purposes or by methods which the federal Act prohibits" (*id.* at 499–500). A similar result was reached in *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, where this Court held that a State could not invoke its restraint of trade laws to enjoin an alleged secondary boycott, that being a type of activity comprehensively regulated by the federal Act and hence barred to State regulation.

After *Garner*, the decisions of this Court seemed to diverge. In one line of cases, the Court held that the *Garner* principle was applicable—and the States barred from entering any kind of cease and desist or injunctive order—even to labor disputes over which the Labor Board declined to exercise jurisdiction because the dispute was predominantly local in nature; thus, a regulatory "no man's land" was created. See, *e.g.*, *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1; *San Diego Building Trades Council* v. *Garmon*, 353 U.S. 236. But the States were permitted to enjoin violent conduct arising out of a labor dispute. See *United Automobile Workers* v. *Wisconsin Board*, 351 U.S. 266; *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131; see, also, *Allen-Bradley Local* v. *Wisconsin Board*, 315 U.S. 740. And in another line of "violence" cases the Court, in some sweeping language, indicated that the power of the States to award damages in respect of conduct constituting a federal unfair labor practice might be unlimited.

Thus, in *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656, the company sued the union for damages in a State court on a common-law tort claim alleging that, in order to ob-

tain recognition as the exclusive bargaining agent, the union had "threatened and intimidated respondent's [*i.e.*, the company's] officers and employees" (347 U.S. at 658); and this Court held that the State court could entertain the suit. As in *Garner*, the conduct alleged to violate State law was also a federal unfair labor practice. But whereas in *Garner* the plaintiff had sought only injunctive relief, and the federal administrative remedy of a cease and desist order could have provided essentially the same relief, nothing in the Board's remedial arsenal could make the company whole; the Board's limited authority to grant monetary awards did not extend to damages for the union's misconduct. The Court reasoned that "[i]f Virginia is denied jurisdiction in this case, it will mean that where the federal preventive procedures are impotent or inadequate, the offenders, by coercion of the type found here, may destroy property without liability for the damage done" (*id.* at 669).

A similar result was reached in *Automobile Workers* v. *Russell*, 356 U.S. 634, also a violence case, though here damages were sought by an employee. In contrast to the situation in *Laburnum*, the Labor Board was not powerless to award the plaintiff monetary relief; although it could not have compensated him for the injury he had sustained, it could have ordered that he be granted back pay for the time that he was prevented from working. But, emphasizing that compensation to victims of unfair labor practices is not the objective of the back-pay provisions of the federal Act, this Court rejected the argument

that the Act constituted the "exclusive pattern of money damages for private injuries. Nor do we think that the Alabama tort remedy, as applied in this case, altered rights and duties affirmatively established by Congress" (*id.* at 645).

Although the Court's decisions seemed to make a critical distinction between injunctive and damage remedies, both *Laburnum* and *Russell* had, as noted, involved a kind of conduct—violence—in which the State regulatory interest was plainly very great, great enough, indeed, so that the States were free to grant injunctive relief as well (see p. 12, *supra*). When *San Diego Building Trades Council* v. *Garmon, supra,* returned to the Court after having been remanded, it was clear that in that case, at least, the State had awarded damages for conduct constituting a federal unfair labor practice but not involving violence or the threat of violence. The State court had held on remand that the union's picketing (designed to persuade customers and suppliers not to deal with the respondents), while peaceful and constituting an unfair labor practice under Section 8(b)(2) of the National Labor Relations Act, also violated State law; and awarded damages of $1,000, representing the losses respondents had sustained by reason of the picketing. This Court reversed. 359 U.S. 236. Observing that in its previous decisions in the area "language may have been used or views implied which do not completely harmonize with the clear pattern which the decisions have evolved" (359 U.S. at 241), the Court used the occasion to attempt a comprehensive restatement of governing principles:

> * * * We have been concerned with conflict * * * with a complex and interrelated federal scheme of law, remedy, and administration. Thus, judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted. When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. However, due regard for the presuppositions of our embracing federal system * * * has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act * * * [o]r where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act. [*Id.* at 243–244.]

For the last proposition, the Court cited the *Laburnum* and *Russell* decisions, and later in its opinion made clear that those decisions should be read as permitting State regulation of "conduct marked by violence and imminent threats to the public order" (359 U.S. at 247; see also *id.* at 248, n. 6), not as broadly authorizing the States to award damages for any and all federal unfair labor practices. The Court noted that State "regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obli-

gation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme" (*id.* at 247).

In holding the State's award of damages barred on the facts presented, which involved no violence or other similarly compelling State interest apart from that in the regulation of labor relations as such, this Court stated: "Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulations ~~which~~ would create potential frustration of national purposes" (*id.* at 244). This broad language should, however, be viewed in its context. In finding that the union's conduct violated State law, the State court relied on enactments dealing specifically with labor relations as well as on general tort principles (see 359 U.S. at 239). And it seems clear that, whatever the technical legal basis of its action, the State court, in awarding damages to the plaintiff, was in fact directly regulating labor relations—just as the State court in *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468 (p. 12, *supra*), in holding that secondary strike activity constituted a conspiracy in restraint of trade under State law, had in fact been making a judgment of labor policy. Whatever its label, State action to regulate conduct so

central to labor relations as recognitional picketing and secondary boycotts, at least where no violence is present, cannot realistically be divorced from labor policy.[4] Such State action cannot be viewed merely in terms of the protection of an interest (like the interest in preventing breaches of the peace, as in *Laburnum, Russell,* and the other violence cases) independent of any appraisal of the conflicting interests of management, labor and the public in union organization and labor disputes and within the primary responsibility of the States.

The basic holding of *Garmon,* then, is that federal law has so far occupied the field of labor relations in industries affecting interstate commerce that the States may not regulate such relations, except where the conduct involved is not even "arguably" either protected or prohibited by the federal Act (359 U.S. at 245).[5] The Court has reaffirmed this principle in

[4] The Court in *Garner* and *Weber* had emphasized how extensively federal law regulated the activities there involved. See Michelman, *State Power to Govern Concerted Employee Activities*, 74 Harv. L. Rev. 641, 672 and n. 143 (1961). Basically the same activity—peaceful picketing—was involved in *Garmon* as in *Garner.*

[5] "* * * In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. * * * The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy" (359 U.S. at 246). Nor may the States regulate conduct which, while neither protected nor prohibited, was designed by the federal Act to be left free from governmental interference. See *Teamsters Union* v. *Morton*, 377 U.S. 252.

a number of cases decided since *Garmon*. See *Liner* v. *Jafco, Inc.*, 375 U.S. 301; *Plumbers' Union* v. *Borden*, 373 U.S. 690; *Iron Workers* v. *Perko*, 373 U.S. 701; *Construction Laborers* v. *Curry*, 371 U.S. 542. But in neither *Garmon* nor any other case has this Court ruled that the States may not enforce traditional rights of action not grounded on precepts of labor policy—the right to recover damages for personal injury, for example—merely because the conduct involved occurs in a labor dispute subject to the federal Act. *Laburnum* and *Russell*, even as qualified in *Garmon*, suggest that they may.

B. AFFORDING A REMEDY FOR DEFAMATION UNDER STATE LAW IS NOT THE DIRECT REGULATION OF LABOR RELATIONS

The interest in reputation is plainly distinct from matters of labor policy. Regulating defamation, even when it arises in the context of a labor dispute, is not the regulation of labor relations—the field that Congress specifically has occupied. Defamation is not an area like picketing, where there is a specific and direct federal interest which is reflected in extensive and explicit federal regulation. The only federal concern with defamation is incidental, arising from the need to assure free and wide-open discussion and debate in organizational campaigns (see pp. 24–29, 37, *infra*). The Board has no mandate to concern itself with reputation, and no power to award damages or other relief for injuries thereto. Therefore, the rule of *Garmon*, which precludes State regulation of conduct in the field of labor relations unless it is plain beyond argument that such conduct is neither pro-

tected nor prohibited under federal law, is, we submit, inapplicable.[6]

If we are wrong in our interpretation of the reach of *Garmon*, we would still strongly argue that defamation, like violence, is a subject so "deeply rooted in local feeling and responsibility" (359 U.S. at 244) that the States retain the power to act. This Court in *Garmon* did not indicate that the prevention of violence was the only permissible predicate of State intervention in labor disputes,[7] and the interest in reputation with which the tort of defamation is concerned is not unlike the interest in bodily integrity involved in the tort of assault. Defamation is more than just an economic tort like unlawful interference with one's business (*Garmon*). Indeed, one of the traditional justifications of providing legal remedies for defamation is to head off breaches of the peace which might be provoked by defamatory statements. See *Beauharnais* v. *Illinois*, 343 U.S. 250, 254.

[6] If it is applicable, the courts below were correct in their view that it embraces the instant suit. We show *infra*, pp. 26–29, that some defamations are federally protected, and some federally proscribed. But even if defamation were neither protected nor proscribed, defamation suits would be barred because the underlying conduct would invariably be at least arguably protected. For the alleged defamation could be found to be truthful; and making a statement in the course of a union organizational campaign that is true and relevant to the issues of the campaign is surely within the protection extended in Section 7 of the Act to "concerted activities for the purpose of collective bargaining or other mutual aid or protection."

[7] The States have also been permitted to intervene where there is an interference with membership rights (*Machinists* v. *Gonsales*, 356 U.S. 617), or a breach of the collective bargaining contract (*Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261).

785-948—65——4

Contrariwise, nothing in the decided cases compels the conclusion that there is no federal limitation on defamation actions arising from labor disputes subject to the federal labor laws. It can hardly be contended that defamation automatically falls within the exception carved by the violence cases. It is clear from other contexts that the law is far more willing to subordinate to competing interests the interest in redressing and preventing defamation than the interest in maintaining peace and order.[8] That defamation suits are predicated on State law designed to protect a substantial interest within the area of the State's primary responsibility, rather than on laws specifically designed to regulate labor relations, and that the Labor Board has authority neither to protect individuals' interest in reputation by awarding compensatory damages nor to deter defamatory conduct by punitive sanctions, cannot, consistently with *Garmon* and *Weber* (see p. 16, *supra*), be deemed controlling. Even in the "violence" cases, moreover, this Court was careful to satisfy itself that the State action in question was not in actual conflict with congressional labor policies. A determination that defamation suits are outside the broad rule of preemption announced in *Garmon* should thus be the beginning, not the end, of inquiry into whether and

[8] See, *e.g.*, *Farmers Union* v. *WDAY*, 360 U.S. 525, 535. Compare this Court's treatment of defamation in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, with its treatment of words inciting to violence in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568. See also *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131, 139, where the Court upheld a State court injunction of, among other things, "massed name-calling * * * calculated to provoke violence."

how far such suits may constitute "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hill* v. *Florida*, 325 U.S. 538, 542.

Enforcement of a State-created right of action, such as defamation, designed for the protection of a substantial interest within the primary responsibility of the State, should not be deemed precluded merely on a showing that it might conceivably have some impact on the structure of labor relations established by federal law. Cf. *Head* v. *New Mexico Board*, 374 U.S. 424; and *id.* at 445 (concurring opinion). Otherwise, enforcement of a State law that set minimum safety conditions for plants located in the State would be barred, on the theory that such a law contracts the area left free by federal law for labor and management to determine their respective rights and duties by voluntary negotiation. A purpose to displace State law in areas of traditional State concern and responsibility—such as personal safety, public order, or reputation—should not be imputed to the federal labor laws (in the absence of evidence of actual congressional intent) unless the danger of conflict with the federal regulatory scheme is real and substantial, not merely remote or theoretical. And if such conflict is found, State law should be deemed preempted only to the extent actually necessary to eliminate the conflict, and with due regard for the fact that the consequence of such preemption is to leave the problems with which the State law deals wholly unresolved. Such problems are, by hypothesis, not peculiarly ones of labor relations. Hence, the

federal labor laws provide no solutions. If State defamation law as applied to labor disputes is deemed preempted by federal law, no law gives a remedy.

A clear case of conflict between a State law based upon a traditionally State-protected interest and federal labor policy would be presented if the State law, as applied, forbade or deterred the exercise of rights specifically granted by Section 7 of the National Labor Relations Act, or required conduct expressly forbidden by it. See *La Crosse Tel. Corp.* v. *Wisconsin Board,* 336 U.S. 18; *Bethlehem Steel Co.* v. *New York Board,* 330 U.S. 767. We shall show that some defamation suits create such a conflict. More subtle, but still dangerous, encroachments may be possible, however, undermining important general interests embodied in the federal scheme rather than colliding with a specific policy. See generally Cox, *Federalism in the Law of Labor Relations,* 67 Harv. L. Rev. 1297 (1954). The danger of such encroachments is also involved in the present case. Such general interests, as defined by this Court (see pp. 11–12, 15–16, *supra*), are basically three.

First, there is the interest in assuring that a uniform labor policy for businesses affecting interstate commerce is applied in all parts of the nation. See, *e.g.,* S. Rep. No. 573, 74th Cong., 1st Sess., p. 5. It is contrary to sound economic and social policy that industry should be encouraged to gravitate toward areas where strong community hostility toward the labor movement finds expression in the legal structure governing labor-management relations. To prevent this may require that controversies arising from labor dis-

putes should, so far as possible, be kept out of State courts. The second, and related, interest is in centralizing the regulation of labor disputes in a single, specialized administrative agency with national jurisdiction, acting only in the public interest. One of the major reasons for the establishment of the Labor Board, and the vesting in it of a broad and exclusive jurisdiction, was an abundance of unhappy experience with leaving labor disputes to the processes of the courts; state judicial processes should not be permitted free reign where the result would be to impair the central regulatory role of the Board contemplated by the federal scheme. Third, the extensive web of federal labor legislation which has grown up over the years strikes a deliberate and delicate balance of legal rights and remedies between labor and management, thereby establishing a framework of law and regulation deemed conducive to minimizing labor strife and encouraging collective bargaining. See, *e.g.*, S. Rep. No. 105, 80th Cong., 1st Sess., pp. 1–2. The balance established by Congress can be disturbed, however, if the parties to labor disputes are free to obtain remedies not available under federal law from State courts.

II

NEITHER COMPLETE PRECLUSION OF NOR COMPLETE FREEDOM FOR DEFAMATION SUITS ARISING FROM LABOR DISPUTES CAN TENABLY BE IMPLIED FROM THE FEDERAL LABOR LAWS

We attempted in the preceding part of our brief to establish an analytical framework for considering the specific question presented by this case. In this

9; *Harnischfeger Corp.*, 9 NLRB 676, 689. Since such epithets as "scab", "unfair", and "liar" are more or less common parlance in a labor dispute (see *Cafeteria Employees Union* v. *Angelos*, *supra*) and are generally uttered in "a moment of animal exuberance" (*Milk Wagon Drivers* v. *Meadowmoor Dairies*, 312 U.S 287, 293), the Board has concluded that the use of such words by employees or their union representative is not so indefensible that it removes those remarks from the protection of Section 7, whether or not they are defamatory. See *Republic Steel Corp.* v. *National Labor Relations Board*, 107 F. 2d 472, 479 (C.A. 3); *Bettcher Mfg. Corp.*, 76 NLRB 526, 527, 532–537; *Thor Power Tool Co.*, 148 NLRB No. 131, 57 LRRM 1161; *Socony Mobil Oil Co.*, 153 NLRB No. 97, 59 LRRM 1619. Similarly, the Board has concluded that statements of fact or opinion with respect to matters relevant to a union organizing campaign or a labor dispute are protected by Section 7, even though they may prove to be erroneous and to reflect on the reputation of one of the parties to the dispute, unless it can be shown that the statements were made with actual knowledge of their falsity or without an honest belief in their truth. See *Bettcher Mfg. Corp.*, 76 NLRB 526, 527, 532–537; *Illinois Tool Works*, 61 NLRB 1129, 1151–1153, enforced, 153 F. 2d 811, 815–816 (C.A. 7); *Atlantic Towing Co.*, 75 NLRB 1169, 1170–1173, enforcement denied, 180 F. 2d 726, 182 F. 2d 625 (C.A. 5); *Westinghouse Electric Corp.*, 77 NLRB 1058, 1060–1061, enforcement denied on other grounds, 179 F. 2d 507 (C.A. 6); *American Shuffleboard Co.*, 92 NLRB 1272, 1274–1275, enforced on

other grounds *sub nom. Cusano* v. *National Labor Relations Board,* 190 F. 2d 898 (C.A. 3); *Electronics Equipment Co.,* 94 NLRB 62, 64–65, enforcement denied on other grounds, 194 F. 2d 650, 205 F. 2d 296 (C.A. 2); *Walls Mfg. Co.,* 137 NLRB 1317, 1318–1319, enforced, 321 F. 2d 753 (C.A.D.C.), certiorari denied, 375 U.S. 923. As the Board pointed out in *Atlantic Towing Co., supra,* 75 NLRB at 1172, it would

> be decidedly unrealistic to hold that the organization and concerted activities envisaged by the Act exclude the utterance by employees of honestly believed statements of fact or opinion, which, in some cases, may actually be unfounded in fact.

This Court, too, has, in another context, discerned an area of conflict between the principles of free speech, on the one hand, and State remedies for defamation, on the other. In *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (discussed further, *infra,* pp. 38–39), the Court held that the First Amendment imposes strict limitations on actions for defamation brought by public officials against critics of their official conduct. (See also *Garrison* v. *Louisiana,* 379 U.S. 64.) The Court stated that "erroneous statement is inevitable in free debate, and * * * must be protected if the freedoms of expression are to have the 'breathing space' that they 'need * * * to survive' " (376 U.S. at 271–272)—even where the erroneous statement causes "[i]njury to official reputation" (*id.* at 272). It noted that the practical effect of freely allowing defamation suits to be brought by public officials against their critics would be to compel "the critic of official conduct to guarantee the

and the next part, we examine the particular considerations that should, in our view, guide this Court in answering the question, and we try to show that they require the Court to embrace a middle ground between the extreme alternative positions, which we argue are untenable.

A. TO PERMIT DEFAMATION SUITS ARISING FROM LABOR DISPUTES TO BE MAINTAINED WHOLLY WITHOUT LIMITATION WOULD SEVERELY UNDERMINE THE FEDERAL REGULATORY SCHEME

The electoral process is a classic method for the prompt, pacific, and effective resolution of controversy in areas of fundamental importance to large numbers of persons, and Congress has made this process a key part of the machinery established by the National Labor Relations Act to prevent labor strife and promote industrial peace by "bringing employers and employees together to resolve their differences through discussion." *Leedom* v. *Kyne*, 358 U.S. 184, 191 (dissenting opinion). Before such discussion (the process of "collective bargaining") can begin, the employees of the plant or other bargaining unit must have a bargaining agent. Once that agent is selected, the duty of the employer to bargain commences. Thus, prompt and authoritative determination of the employees' bargaining agent is an imperative if the bargaining process is to go forward.

Our national labor relations policy embodies a philosophy of industrial self-government, under which the terms and conditions of employment should be determined by free negotiation between labor and management rather than imposed by government. See

Cox and Bok, *Labor Law* (1962), p. 132. It follows, surely, that the employees' collective bargaining agent, who is responsible for negotiating a contract that will govern the terms and conditions of employment for the employees he represents, should be the free choice of those employees, not a choice dictated by others. This, at all events, is the theory that finds expression in the federal labor laws. Section 7 of the National Labor Relations Act grants employees the right to bargain collectively "through representatives of their own choosing." Section 9(a) provides that "[r]epresentatives designated or selected by the majority of the employees in [the bargaining unit] * * * shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining." And Section 9(c) provides that, should the Board find that a "question of representation exists," it "shall direct an election by secret ballot and shall certify the results thereof."

The electoral process can, of course, be perverted. Elections can be contrived and manipulated to produce a predetermined, not a free, choice. Therefore, it is not enough to ordain elections; the integrity of the electoral process must also be guaranteed. Recognizing the applicability of this principle to representation elections, the framers of the National Labor Relations Act endowed the Labor Board with authority to protect that process, and the Board, accordingly, has many times set aside elections because of coercion, intimidation, or harassment of the employee-voters, misleading or highly inflammatory statements, and similar campaign tactics that interfere with em-

ployees' expressing a free choice in such elections. See, *e.g.*, *Dal-Tex Optical Co.*, 137 NLRB 1782, 1787; see generally Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38 (1964).

But in exercising its regulatory powers over campaign tactics, the Board has been mindful of the danger that heavy-handed regulation, though motivated by a laudable desire to assure that employees exercise a rational, wise, and objective choice, could have exceedingly harmful effects on the free-election principle. Labor disputes tend to be heated affairs, and representation campaigns especially can be bitter. Such a campaign is often characterized by extreme charges and countercharges, unfounded rumors, *ad hominem* accusations, misrepresentations, exaggerations, and distortions. See *Cafeteria Employees Union* v. *Angelos*, 320 U.S. 293, 295. Not only would it be impracticable for the Board to take notice of any but grossly unfair campaign tactics; the free exchange of information and opinions, which the electoral process is designed to encourage, would be stifled were the highest standards of dispassionate fairness, reasonableness, and objectivity imposed on campaign utterances. If representation elections are to be free and their results are to command the acceptance of the parties, government interference in the campaign should be avoided except with respect to tactics so extreme that they are likely to make the election result unrepresentative of the actual will of the majority.

The Board's approach, accordingly, has been a highly permissive one. Thus, the fact that an utterance is defamatory and false is not considered, as such, a ground for setting aside a representation election, and *a fortiori* not a basis for an unfair labor practice finding. The Board has made clear that it does not "police or censor propaganda used in the elections it conducts, but rather leaves to the good sense of the voters the appraisal of such matters, and to opposing parties the task of correcting inaccurate and untruthful statements." *Stewart-Warner Corp.*, 102 NLRB 1153, 1158. It will set aside an election on the basis of untrue campaign statements only where (1) a material fact has been misrepresented, (2) there has been insufficient opportunity for the other party to reply, and (3) it is likely that the misstatement has had an impact on the employees' free choice. See *Hollywood Ceramics Co.*, 140 NLRB 221, 223–224; *F. H. Snow Canning Co.*, 119 NLRB 714, 715, 717–718.

The problem of untruthful and derogatory statements also arises in connection with the Board's administration of Section 7 of the Act, which guarantees to employees "the right to self-organization * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Ordinarily, concerted activity does not lose the protection of Section 7 unless it is clearly repugnant to the provisions or policies of the Act, or other federal laws, or unless it is so indefensible under the circumstances as to render the employee unfit for future employment. See *National Labor Relations Board* v. *Washington Aluminum Co.*, 370 U.S.

truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount" (*id.* at 279), thereby producing an undesirable "self-censorship": "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so" (*ibid.*). The Court drew upon the analogy of the limitations that have been imposed on defamation actions against public officials. "The reason for the official privilege is said to be that the threat of damage suits would otherwise 'inhibit the fearless, vigorous, and effective administration of policies of government' and 'dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.' *Barr* v. *Matteo* [360 U.S. 564, 571]" (376 U.S. at 282).

These observations apply with considerable force to representation campaigns, and equally, it would seem, to union organizing and recognitional efforts preceding the actual campaign. Congress and this Court have expressly recognized the applicability of the principles of free speech in the labor field. See Section 8(c), 29 U.S.C. 158(c); *Thomas* v. *Collins,* 323 U.S. 516, 538; *National Labor Relations Board* v. *Virginia Electric & Power Co.,* 314 U.S. 469, 477. In this area, too, full liability under conventional defamation principles could have a deterrent effect, producing a self-censorship that would dampen the vigor and limit the variety of the debate (see 376 U.S. at 279); and here, too, the vigor and ardor of the responsible officials,

both of labor and management, could be impaired by unlimited damages liability. A similar concern led this Court to hold that the Federal Communications Act by implication grants radio and television stations immunity from liability for defamatory statements made during a political broadcast. *Farmers Union* v. *WDAY*, 360 U.S. 525. The Court noted that if the station was not given such immunity the result would be "censorship * * * [which] would almost inevitably force a candidate to avoid controversial issues during political debates over radio and television, and hence restrict the coverage of considerations relevant to intelligent political decision," contrary to congressional intent. *Id.* at 530–531. Similarly, we submit, the national labor policy requires that some limitations, at least, be recognized on the power of the States to give remedies under conventional principles of defamation.

Suppose, for example, that in the course of a bitter representation campaign in which an independent union seeks to displace a company-dominated employees association as exclusive bargaining agent, one of the union leaders charges the company president with having "lied" about the company's financial ability to pay higher wages. The union leader believes the charge to be true. But the company president sues him, and the union, for defamation, asking general damages of $1,000,000. Although the defendants introduce evidence to establish the defense of truth, the verdict is for the plantiff and he is awarded substantial damages though in fact no pecuniary injury was shown. Such an award would be proper

under conventional principles of defamation. See 1 Harper and James, *Torts* (1956), § 5.30, pp. 468–472. Imposing extensive liability for statements uttered in the course of a heated representation campaign would thus inevitably discourage free and wide-open debate and make the campaigners cautious and timid. This would impair the effectiveness of the representation campaign as a method whereby the employees may express themselves on matters of fundamental importance to them. The Labor Board has so recognized, in ruling that it is an unfair labor practice for an employer to discharge an employee for disparaging or defaming him honestly, though falsely, in a statement relevant to a labor dispute (see cases cited at pp. 28–29, *supra*).

The dangers that unrestricted defamation suits pose to the federal policy of free expression in representation and other organization campaigns are more than hypothetical. In Appendix B, pp. 55–57, *infra,* we summarize briefly the reported cases involving suits for defamation arising out of labor disputes, indicating the salient allegations of the complaint where that information is available. Our summary shows that many of the cases have involved marginal defamatory conduct—*e.g.*, the charge that an employer is "unfair," or uses the "'big lie' tactics of Hitler," or "treats its employees as criminals"—of a kind that the Labor Board would regard as protected by Section 7. Cf. *Bettcher Mfg. Corp.,* 76 NLRB 526, 527, 532–537; *Thor Power Tool Co.,* 148 NLRB No. 131; *Socony Mobil Oil Co.,* 153 NLRB No. 97. If such cases are permitted to go to judgment, an appreciable chilling

of free debate in circumstances where such debate directly promotes the basic objectives of the NLRA seems likely.

Aside from encroaching on an express and specific policy of the federal labor laws—that which ordains free elections as the exclusive method of determining the bargaining representative when there is a dispute, and, as a concomitant, free and wide-open debate and discussion during representation and other organization campaigns where the support of employees is sought—an unlimited private right to seek redress for defamation is inconsistent with some of the more general features of the federal regulatory scheme. First, the availability of a State court remedy for defamation growing out of a labor dispute may detract from the central regulatory role of the Labor Board. Suppose that a union leader feels that a defamatory statement uttered against him by a rival leader at the very last moment of the representation campaign unfairly swung the election to the rival union. Assuming no restriction on the power of the State courts to entertain such defamation suits, he has a choice of remedies. He may complain to the Board, which might result in the Board's setting aside the election, or he may sue for damages in State court. If he pursues the latter remedy first, the result may be that an election that should have been set aside as not reflecting the actual will of the majority will be left undisturbed, while the controversy "drags on and on in the courts, keeping old wounds open, and robbing the administrative remedy of the healing effects it was intended to have." *United Construction Workers* v.

Laburnum Corp., 347 U.S. 656, 671 (dissenting opinion).

Further, the availability of a remedy for defamation may disturb the delicate balance between the contestants in a representation or organizing campaign that the federal scheme seeks to create. The threat of broad liability for defamation is, we think, more likely to deter a union from embarking on strenuous organizing efforts in a new plant than it is to dampen the vigor of management in opposing such efforts. Significantly, most of the reported defamation suits have been brought by employers against unions, rather than vice versa (see Appendix B, *infra*). And more generally, the ever-present possibility of a heavy damages award is likely to bear more heavily on weak unions and weak employers than on strong ones, again disturbing the balance intended by Congress.

Finally, there is a danger than unlimited liability for defamation could undermine the uniformity of labor policy among businesses located in different areas of the country which it is a prime object of the federal labor laws to foster. For one thing, there are important differences among the defamation laws of the various States.[9] For another, local or regional

[9] One important difference is that while most States recognize no "conditional privilege" for communications to employees relating to a labor dispute affecting them, a few apparently do. Thus, in *Meyers* v. *Huschle Bros.*, 274 App. Div. 80, 83, 80 N.Y.S. 2d 173, 175, the defendant employer distributed to his employees a circular letter which asserted that the plaintiffs, officials of a labor union apparently engaged in organizing plaintiff's employees, had "Un-American ideas" and misused union dues. In an action for libel based on these allegations it was held that the employer's letter related to "a matter of common interest in connection with the em-

hostility to unions may find effective expression in the enforcement of rights of action for defamation. Suppose, for example, that an independent union attempts for the first time to organize employees in a plant in an area where unions are weak and local feeling (including local judicial feeling) is strongly hostile to unionization. During the organization campaign, some employees are heard to utter disparaging epithets about company officials; the company brings a series of defamation actions in State courts, seeking heavy general and punitive damages; and the State-court judge and jury, sympathizing with the company's objectives and opposed to the union, award the damages sought. Such a result would be indisputably contrary to the basic objectives of federal labor policy. In this connection we invite this Court's attention to the petition for certiorari in *United Steelworkers of America* v. *R. H. Bouligny, Inc.*, No. 19, this Term (certiorari granted, 379 U.S. 958), p. 10, nn. 6 and 7,

---

ployment and working conditions of the employees" and that the trial court had erred in striking the defense of qualified privilege. In *Emde & Son* v. *Joaquin County Central Labor Council*, 23 Cal. 2d 146, 143 P. 2d 20, the defendant union was engaged in a labor dispute with plaintiff employer, who had allegedly violated a collective bargaining agreement with defendant. The union published in the local "Labor Journal" an article concerning the dispute and containing matter allegedly defamatory of the employer with respect to his role in the dispute. The Supreme Court of California held, *inter alia*, that, even if the union's charges were false and defamatory, "* * * since the comment was published in a newspaper devoted exclusively to the interests of organized labor, its publication was conditionally privileged" (23 Cal. 2d at 161, 143 P. 2d at 28). *Emde* was followed in *Di Giorgio Fruit Corp.* v. *American Federation of Labor*, 30 Cal. Rptr. 350 (Cal. Dist. Ct. App.).

listing a number of defamation suits against labor unions, "each seeking astronomical damages" (p. 9), which are now pending in federal district courts in the Southeast on removal from State courts. The parallel to the *Times* libel case need not be labored. See 376 U.S. at 294–295 (concurring opinion).

In short, much conduct that may be defamatory under State law would be deemed by the Board to be protected under Section 7 of the National Labor Relations Act. To the extent that such direct conflict is present, it is plain that the State law is preempted (see pp. 10, 22, *supra*). We have also pointed out other respects in which there may be conflict between federal labor policy and State defamation actions. Some restriction on State defamation suits growing out of labor disputes seems plainly necessary to prevent "obvious and unavoidable conflict between the federal and state directives" (*Farmers Union* v. *WDAY*, 360 U.S. 525, 541 (dissenting opinion)); "an explicit conflict * * * [rather than merely] occasional interferences by State law with federal policy" (*id* at 546). We again point out that even a State law not designed specifically to regulate labor relations cannot stand if it is an obstacle to the realization of the congressional will (see pp. 20–21, *supra*). "It is not the label affixed to the cause of action under State law that controls the determination of the relationship between State and federal jurisdiction." *Plumbers' Union* v. *Borden*, 373 U.S. 690, 698.

B. TO PRECLUDE ANY AND ALL DEFAMATION SUITS ARISING FROM LABOR DISPUTES, HOWEVER, WOULD GIVE INSUFFICIENT WEIGHT TO A SUBSTANTIAL STATE INTEREST, AND IS NOT NECESSARY TO EFFECTUATE THE POLICIES OF THE FEDERAL LAW

Obviously the most effective way to avert the danger of encroachment would be to deem all such suits preempted. But this would mean that however great the injury to the reputation of the defamed person, however malicious and unjustifiable the defamatory utterance, and however unrelated it was to any legitimate objective, there would be no remedy. Reputation is not one of the interests with which federal labor law is concerned,[10] and the Board has no power to award compensation for its injury. It is fundamental that the Board acts only to vindicate public rights. See *Garner* v. *Teamsters Union,* 346 U.S. 485; *Amalgamated Utility Workers* v. *Consolidated Edison Co.,* 309 U.S. 261; *Virginia Electric Co.* v. *National Labor Relations Board,* 319 U.S. 533. If ever there was a private right clearly beyond the jurisdiction or competence of the Labor Board to enforce, it is the right not to be defamed. More important, it is neither reasonable as a matter of interpretation of congressional

[10] Thus, when the Board determines that an employee's defamatory statement is protected by Section 7, and that the employer may not discharge him for making it, the Board balances the employer's interest in discipline against the employee's interest in self-organization. If the latter outweighs the former, the Board will find the statement protected, regardless of its impact on the employer's reputation. Similarly, when the Board determines that a statement made in the course of a representation campaign is not a ground for setting aside the election, the Board considers only whether the statement would tend to interfere with a fair and free election, not whether it is injurious to reputation.

intent, nor necessary to effectuate the legislative will, to hold that all right to seek redress for defamations made during labor disputes has been extinguished by the federal labor laws.

Consider the following example. Rival unions are contesting the right to represent the employees of a particular plant. The leader of one union accuses the leader of the rival union of being a homosexual, unfit to hold a position of leadership, and he "documents" this charge—which is wholly malicious and untrue—with forged letters that implicate the rival leader in homosexual acts. The latter loses his job and is forced to leave town, sustaining substantial pecuniary (as well as emotional) injury from the incident. The Board would be powerless to afford him any redress, although the interest in affording some redress in the aggravated circumstances hypothesized is plainly very great—not less, surely, than in the "violence" cases (see pp. 12, 15, *supra*), where this Court recognized a compelling State-protected interest and refused to hold that the federal regulatory scheme superseded it. Moreover, suppressing this kind of defamation would not seriously undermine the federal policies.

On this point the *Times* libel case again provides an instructive analogy. The Court there made clear, rejecting the view of the three concurring Justices, that damages could constitutionally be awarded a public official in a defamation suit against a critic of his official conduct if actual malice was proved, that is, if the defamatory utterance was made "with knowledge that it was false or with reckless disregard of

whether it was false or not" (376 U.S. at 280). If the interest in free and wide-open debate in the political arena thus stops short of requiring the protection of malicious defamation, it is difficult to justify a rule of complete preclusion in the labor arena. There is, to be sure, always the danger that a particular jury might find actual malice in a case where there was in fact none, with the result that a participant in a representation or organizing campaign was penalized for conduct which the Board, had it been the finder of the facts, would have deemed fair and legitimate, indeed federally protected, campaign tactics. But we do not think that this risk is so great as to override the States' strong interest in providing redress for such aggravated instances of defamatory conduct, any more than the risk that a State court might find picketing violent which the Board would find peaceful, would warrant placing the regulation of violence in labor disputes beyond State power under the "arguably protected" formulation.

III

STATE COURTS SHOULD BE PROHIBITED FROM ENTERTAINING DEFAMATION SUITS BASED UPON STATEMENTS ARISING FROM LABOR DISPUTES EXCEPT WHERE (1) THE DEFAMATORY STATEMENT WAS MADE WITH WILLFUL OR RECKLESS DISREGARD FOR THE TRUTH, AND (2) THE DEFAMATION GRAVELY INJURES THE PLAINTIFF'S REPUTATION

We have shown in the preceding part that some defamation suits maintainable under State law seem clearly incompatible with the federal regulatory scheme, and indeed infringe Section 7 protected rights,

while others present far less danger of conflict and at the same time vindicate a compelling State interest. We urge this Court, therefore, to fashion, from the design and policies of federal labor law and the principles of federalism, a reasonably clear and certain standard that will afford a federal defense to some but not all defamation suits growing out of labor disputes. We have already indicated one factor which possibly should be considered in drawing the line: whether actual malice is present. This was the factor singled out by this Court in the *Times* libel case. However, it would not be appropriate simply to transpose the *Times* rule to the labor context and stop there, without examining special considerations which, as we demonstrate *infra*, pp. 41–49, apply to that context and may require additional safeguards. In this part of our brief, we take up these considerations and sketch the basic elements of a sound and workable standard.

A. NO LIABILITY SHOULD ATTACH UNLESS THE DEFENDANT KNEW THAT THE DEFAMATORY STATEMENT WAS FALSE OR WAS RECKLESSLY INDIFFERENT TO WHETHER OR NOT IT WAS TRUE

The rule of the *Times* libel case provides, we believe, a sound starting point for a standard delimiting the scope of defamation in labor disputes. The existence of a complete federal defense to nonmalicious defamation suits arising from labor disputes subject to federal jurisdiction under the labor laws is supported not only by the fact that the Board applies that standard in administering Section 7 of the Act and by the other considerations which we have discussed, but by the common-law principle that there exists a con-

ditional privilege (*i.e.*, a privilege that is forfeited if actual malice is proved) for defamatory communications between those having a common interest where the communications are for the protection or advancement of that interest.[11] Members of religious or professional societies, fraternal, social or educational organizations, families, and labor unions have been held to have a qualified privilege to communicate matter pertinent to the interest of the group. Similarly, communications between the officers, agents or employees of a business with respect to the affairs of the business have been held privileged, on the theory that there exists a common interest in the success of the enterprise. Thus an employee is privileged to inform his employer of the supposed misconduct of a fellow employee, and an employer is privileged to transmit similar information either to another member of management or to other employers.

The justification for this privilege is that the individual's interest in reputation is outweighed by the social desirability of encouraging a person to communicate fully and freely when he is communicating to protect or advance his own interests and those of the recipient of the communication. The reasoning which supports the existence of a conditional privilege in the "common interest" situation described above applies equally to communications by the employer or

[11] See Prosser, *The Law of Torts*, § 95 (2d ed. 1955); 1 Harper and James, *Torts*, § 5.26 (1956); American Law Institute, *Restatement of the Law, Torts*, § 596 (1938); see also Evans, *Legal Immunity for Defamation*, 24 Minn. L. Rev. 607 (1940).

the union to employees, and to communications between fellow employees, with respect to an organizing campaign. Each of these parties—employer, union, and especially the employees—has a substantial interest in whether the employees are to be represented for collective bargaining purposes, and, if so, by whom. Here as in other situations in which there is a group decision to be made on matters of basic importance to the persons involved, full freedom of discussion is indispensable to an informed and reasoned choice between alternatives.

Where actual malice is proved, the defendant's misconduct is more aggravated and less excusable, and the victim's interest in redress greater, than where the defamation is innocent. Moreover, requiring the contestants and other participants in organizing and representation campaigns to refrain only from campaign utterances that they know to be false should not unduly inhibit the free and wide-open debate that federal law seeks to encourage. "[T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected." *Garrison* v. *Louisiana*, 379 U.S. 64, 75. Further, the rule of actual malice should be deemed to embrace reckless disregard for whether the defamation is true or false, consistently with this Court's *Times* libel decision (see pp. 38–39, *supra*), to cover the case, for example, of the defendant who is shown to have circulated a pamphlet falsely accusing the plaintiff of being a member of the Communist Party, and, when questioned about the basis for this charge, explains that

he did not know—or care—whether the plaintiff was or was not in fact a member, but simply felt that the charge was an effective campaign tactic. The "reckless" corollary is sometimes put in terms of the defendant's lack of a reasonable basis for believing the defamatory utterance to be true. See 1 Harper and James, *The Law of Torts* (1956), § 5.27, p. 453. But this Court rejected that formulation in *Garrison v. Louisiana, supra,* 379 U.S. at 79, explaining that since "defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth," failure to exercise "ordinary care" to verify the truth of the defamatory utterance does not forfeit the privilege. The test of reckless disregard similarly provides a more appropriate standard that "lack of a reasonable basis" or "failure to exercise ordinary care" whereby to confine State defamation suits in labor matters to the hard core of aggravated and clearly indefensible defamations—which is as far as State power in this area can be permitted to extend without substantial conflict with federal policy.

It should be emphasized that in the *Times* case this Court did *not* hold that actual malice was the only element of proof that must be shown to sustain an award of damages in a suit by a public official against a critic of his official conduct, or that such an award might not be precluded by the Constitution on other grounds. Indeed, in its searching review of the State court's decision, the Court exposed other serious infirmities besides the fact that the jury had not been instructed that actual malice must be proved (see 376 U.S. at 284–292). Moreover, it is plain that special

considerations may be applicable to defining the permissible scope of defamation actions in the labor field, where federal policy favoring free expression and discussion is derived not only from the Constitution, but from the specific provisions (particularly Sections 7 and 9) of the National Labor Relations Act. Finally, it has been suggested that juries are likely to find the concept of actual malice "elusive" (*New York Times Co.* v. *Sullivan,* 376 U.S. 254, 302, n. 4 (concurring opinion)), and it does seem that the distinction between a reckless and a merely negligent failure to verify the truth of a campaign utterance might involve subtleties which jury or judge might sometimes fail to comprehend and which could lead to unfair results in places where hostility to unions is strong.

B. LIABILITY SHOULD ALSO BE PRECLUDED UNLESS THE DEFAMATION IS GRAVELY, AND NOT MERELY TRIVIALLY, INJURIOUS TO THE PLAINTIFF'S REPUTATION, BEARING IN MIND THAT A RATHER HIGH LEVEL OF ABUSE, EXAGGERATION, AND NAME-CALLING IS THE NORM IN LABOR CAMPAIGNS

Many State courts would very likely regard as defamatory and actionable many charges and epithets that are commonplace in representation and organization campaigns. These tend to be heated affairs in which exaggerated, intemperate, and abusive language (whether in campaign speeches or in campaign leaflets, pamphlets, and other written statements) abounds (see pp. 26, 28, 32, *supra*). Such conventionally defamatory words as "liar", "crook", and "skunk" (see 1 Harper and James, *supra,* § 5.2, pp. 357–359) are mild examples of that kind of language. We believe that as a practical matter it is inevitable

that such terms will be bandied about, even recklessly, in such campaigns, and we strongly doubt whether the reputation of the usual victims of such name-calling is often actually injured, or whether there is a very substantial social interest in legal proceedings to redress this kind of abuse.

We submit that this Court should confine State defamation actions arising from labor disputes to grave defamations—those which accuse the defamed person of having committed a felony, or of engaging in sexual misconduct, or of belonging to a disloyal group (*e.g.*, the Communist Party), or of espousing treasonable or disloyal views, or of other misconduct which the community regards as infamous. Under this theory, many of the defamation actions described in Appendix B, *infra,* would be barred at the threshold, without submitting the question whether the defendant acted with actual malice to the jury. An example is *Brantley* v. *Devereaux,* 58 LRRM 2293, 2294, where the alleged defamatory statement was that "[the plaintiff is] going uptown and buying tacks and throwing them in the mill's gates and in people's driveways." As noted earlier (see p. 28, *supra*), the Board itself regards such marginal defamations as within the broad scope of the Section 7 protected right of free and wide-open expression in organizing campaigns.

Charges and countercharges that might be genuinely defamatory in other contexts may be relatively trivial and harmless in the special circumstances of a labor dispute, in particular a representation or organizing campaign, although a State court, having only limited experience with such campaigns, might well not realize

this. Exaggeration, hyperbole, and nasty epithets are expected and hence discounted in such an election campaign, especially since their partisan origin is usually clear. Suppose, for example, that the union distributes a pamphlet which falsely (indeed recklessly) charges the company's president with having once used "scabs" and tear gas to break up a strike. Such a charge would probably be dismissed by most as a piece of campaign literature not worthy of belief. Experience suggests that a defamation suit predicated on such a "thin" (in the circumstances) libel is as likely to be a tactic aimed at crippling the union's organizing efforts as a genuine attempt to remedy a palpable wrong. In this connection we again point out (see pp. 31–32, *supra*) that substantial general damages would be recoverable in such a suit though no actual economic injury to the plaintiff was even alleged.

C. IT IS QUESTIONABLE WHETHER EITHER PUNITIVE DAMAGES OR INJUNCTIVE RELIEF SHOULD BE ALLOWED

Inherent uncertainties as to the scope and application of the limitations suggested in subparts A and B, *supra,* indicate, we submit, that certain additional safeguards may be necessary. Chief Justice Warren, dissenting in *Automobile Workers* v. *Russell,* 356 U.S. 634, noted that "[d]iffering attitudes toward labor organizations will inevitably be given expression in verdicts returned by jurors in various localities" (356 U.S. at 651), and that this threat to the desired uniformity of federal labor policy was aggravated "when the plaintiff is seeking punitive or other dam-

ages for which the measure of recovery is vague or nonexistent" (*ibid.*). The determination of the amount of general damages to be awarded in a defamation action is inherently vague and uncertain. The vagueness and uncertainty are compounded if punitive damages are also recoverable. And, if punitive damages are barred, the State's interest in deterring malicious defamation can still be vindicated in criminal actions. We urge the Court, therefore, to consider whether the federal regulatory scheme should be deemed to preclude the award of punitive damages in defamation actions growing out of labor disputes in industries subject to the federal Act. See Note, 78 Harv. L. Rev. 1670, 1675, n. 28; cf. Prosser, *Interstate Publication,* 51 Mich. L. Rev. 959 (1953). There is direct precedent for such a limitation in the labor field. See *Teamsters Union* v. *Morton,* 377 U.S. 252, 260–261.

While injunctions against defamation are rarely sought, at least one such action has been brought in the labor field. See *Teamsters Local 150* v. *Superior Court,* 56 LRRM 2993, Appendix M, *infra,* p. 55. In view of the traditional disfavor for labor injunctions and the grave danger of unreasonably inhibiting free expression presented by an injunction against an alleged defamatory campaign utterance, we urge this Court to consider whether such suits should also be deemed barred.

D. THE STANDARD ELABORATED ABOVE SHOULD BE APPLICABLE TO ALL REPRESENTATION, ORGANIZATION AND RECOGNITIONAL EFFORTS AND ACTIVITIES, AND, PERHAPS, TO ALL UTTERANCES OR STATEMENTS *ARGUABLY* ARISING THEREFROM

Our discussion has focused mainly on the problem of defamation suits arising from representation campaigns. But it applies with equal force to organizational efforts preceding the actual representation campaign, and indeed to all efforts of either party to a labor dispute to enlist support for its position (see p. 30, *supra*). In other settings—collective bargaining sessions or grievance procedures, for example—other considerations may weigh in the balance; specifically, the interest in encouraging free and wide-open debate may be somewhat less. Since it does not appear that defamation suits arise as frequently in these other settings, we do not propose at this time a federal standard applicable to them as well.

The question might arise in some cases whether the alleged defamation should be regarded as "arising from" a labor dispute to which the federal standard applies. Suppose that a union leader accuses the brother of the company's president of being a "congenital two-faced liar," and he sues for defamation, contending that while the charge was made during a representation campaign it was wholly unrelated to that campaign, since he had absolutely nothing to do with the policies or actions of the company or its officials. Such a suit should not be barred. But there is a risk that contentions of this sort might be effective in unduly whittling down the federal standard we have adumbrated. Therefore, we urge this Court to consider whether the arguably-subject test of *Garmon*

(see p. 17, *supra*) should be deemed applicable to the question of the relevance of the alleged defamation to the labor dispute; under this test, the State court would have to hold the federal standard applicable if it was arguable that the defamation was relevant to the objectives of the campaign.

A final point is that while the federal safeguards should not be applicable where it is clear beyond argument that the defamation was unrelated to the issues of the labor dispute, their applicability probably should not be affected by the fact that the union or employer does not limit publication of its defamatory statements to the employees directly involved in a labor dispute, but publishes to a wider audience, seeking thereby to engender public support for its position. The parties to a labor dispute have a legitimate interest in informing the public of the existence of the dispute and in seeking to attract public support for their respective positions. See Sections 8(b)(4) and 8(b)(7)(C), 29 U.S.C. 158(b)(4), 158(b)(7)(C); cf. *Thornhill* v. *Alabama,* 310 U.S. 88; *National Labor Relations Board* v. *Fruit & Vegetable Packers,* 377 U.S. 58, 76–80 (concurring opinion).

IV

THE INSTANT CASE SHOULD BE REMANDED FOR RECONSIDERATION IN LIGHT OF THE STANDARD OUTLINED HERE

The instant case involves the distribution of leaflets which purported to give a factual account of, and to express an opinion on, matters germane to a labor dispute subject to federal jurisdiction. The employer, in the course of a union organizing campaign, was

charged with concealing its collective bargaining contract at another location, denying its employees there the right to vote in a Board election, and depriving them of pay increases. The opinion was expressed that criminal charges would be filed and that "[s]omebody may go to Jail." Actual malice was alleged. The district court dismissed the case on the pleadings, holding that any defamation suit arising from a labor dispute subject to the Labor Board's jurisdiction is barred under *Garmon,* and the court of appeals affirmed on the same ground. While the judgment of the court of appeals should be reversed and the case remanded to the district court, that court, before proceeding to trial, must determine whether the complaint is barred by federal law, since it is questionable whether a "grave" defamation is alleged as we have defined that term (see pp. 44–46, *supra.*)[12] But we do

[12] A remand would also appear appropriate in *Joint Council 53, International Brotherhood of Teamsters* v. *Meyer*, and *Local 107, International Brotherhood of Teamsters* v. *Meyer*, Nos. 89 and 94, this Term, petitions for certiorari pending. There, one union, in the course of an election campaign preceding an NLRB election, published, allegedly with willful and malicious intent, defamatory matter about the officers of another union, also a party to the election. The Supreme Court of Pennsylvania held the officers' suit for defamation not preempted, but on very different grounds from those we suggest. The court held, in our view erroneously, that the State interest in the protection of reputation is so substantial that the preemption doctrine is totally inapplicable to suits for defamation. 416 Pa. 401, 206 A. 2d 382. The case should be remanded for determination of the factual issues made relevant by the narrower approach set forth here—*i.e.*, whether the statements were arguably germane to the election campaign or whether they were made with actual malice, whether a grave defamation was shown, etc.

not think the suit should be barred merely because the General Counsel of the Labor Board administratively has ruled that the union was not responsible for the alleged defamation.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to the district court for reconsideration in the light of the principles set forth herein.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
RICHARD A. POSNER,
Assistant to the Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
STEPHEN B. GOLDBERG,
LAURENCE S. GOLD,
Attorneys,
National Labor Relations Board.

SEPTEMBER 1965.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with re-

spect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * * * *

SEC. 9(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

APPENDIX B

Defamation Cases Arising From Labor Disputes

Blum v. *I.A.M.*, 42 N.J. 389, 201 A. 2d 46, 56 LRRM 2417 (Plant manager seeks damages for union statements during organizing campaign, for example, "Joe is using the 'Big lie' tactics of Hitler and the fear and threats like Russian pressures to dictate your future").

Hill v. *Moe*, 367 P. 2d 739 (Sup. Ct. Alaska), certiorari denied, 370 U.S. 916 (Company seeks $100,000 for defamatory union publications in local newspaper, $100,000 for unlawful picketing and $50,000 for each of two employers for mental and nervous strains during union's campaign for recognition).

Warehouse Workers v. *U.S. Gypsum Co.*, 56 LRRM 2829 (Superior Court, Pierce County, Washington) (Union sues employer for allegedly libelous publications disseminated during election campaign).

Schnell Tool & Die Corporation v. *United Steelworkers*, 200 N.E. 2d 727 (Court of Common Pleas, Columbiana County, Ohio), affirmed December 3, 1964 (Ohio Ct. Appeals) (Company sues union negotiator for libelous and slanderous statements).

Teamsters Local 150 v. *Superior Court*, 56 LRRM 2993 (Cal. Dist. Ct. Appeals) (Company attempts to enjoin distribution of union handbill to public during organizing campaign with words: "LIE DETECTOR TESTS are given regular employees. They are questioned about intimate details of their private lives to further embarrass and humiliate them * * * Coca Cola * * * treats its employees as criminals. Help convince the Coca Cola Company that you and other

modern consumers do not believe in these totalitarian practices.").

Troidl v. *Keough*, 58 LRRM 2311 (N.Y. Sup. Ct. Erie County) (Union organizers seek money damages from rival union for publication to employees of letter stating: "raiding organizations have been known to falsify signature cards * * * if the U.A.W. does petition the N.L.R.B. for an election we intend to immediately file charges of FRAUD against them based on the proof we now have that they are using forged signatures on their cards.").

Inland Air Conditioning v. *Bergan*, 57 LRRM 2296 (Cal. Superior Ct., Riverside County) (Employer sues for publication and circulation of allegedly defamatory letter by Union during negotiations).

Meyer v. *Joint Council 53, Teamsters*, 58 LRRM 2183 (Pa. Sup. Ct.) petition for certiorari pending, Nos. 89, 94 this Term. (Individuals campaigning on behalf of rival union sue defendant incumbent unions for circulation of tabloid with statements that active leaders of plaintiff's rival union had been convicted of a list of crimes including rape, sodomy, and corrupting the morals of a minor).

Brantley v. *Devereaux*, 58 LRRM 2293 (E.D. S.C.) (Union officer sues representative of management for statement made during collective bargaining session: "Brantley's going uptown and buying tacks and throwing them in the mill's gates and in people's driveways.").

Bouligny, Inc. v. *United Steelworkers*, 336 F. 2d 160 (C.A. 4), certiorari granted on another issue, 379 U.S. 958 (Employer brought libel action against union for pamphlet during Board election campaign charging that he had fired one of the union's adherents and had sought to procure that employee's discharge from another job obtained by the union).

Dump Truck Owners Assn. v. *Teamsters*, 49 LRRM

2933 (Cal. Superior Ct., Los Angeles County) (Employer association sues union for allegedly libelous publication of articles in union house organ stating that the association was not acting in best interests of his members in its opposition to union's efforts to negotiate contract).

Sullivan v. *Day Publishing Co.,* 58 LRRM 2711 (D. Conn.) (Labor relations consultant of employer sues for allegedly libelous statements by union representatives in two newspapers, "company has hired an out-of-town union buster * * * and he is using all of the oldest tricks of the trade, divide and conquer, by falsehood and fear.").

Oss v. *Birmingham,* 58 LRRM 2754 (Ariz. Sup. Ct.) (Employer sues union officials for slander, "he is unfair").

Record-Chronicle v. *Typographical Union,* 59 LRRM 2200 (Wash. Superior Ct., King County) (Newspaper publisher sues two unions and officers for the distribution of allegedly defamatory leaflets through which $250,000 in damages were allegedly incurred).

U. S. GOVERNMENT PRINTING OFFICE: 1968

INDEX

CITATIONS

Miscellaneous: **Page**

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 45

WILLIAM C. LINN,
Petitioner,
v.
UNITED PLANT GUARD WORKERS OF AMERICA,
LOCAL 114, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER, WILLIAM C. LINN

William C. Linn, Petitioner, prays that the decision of the United States Court of Appeals for the Sixth Circuit in the matter of *Linn v. United Plant Guard Workers of America, Local 114, et al.*, 337 Federal 2d 68, be reversed and that Petitioner's complaint against the Respondents herein be reinstated for trial on the docket of the United States District Court for the Eastern District of Michigan.

OPINIONS BELOW

The memorandum opinion of the District Court is unreported. It is contained in the record at pages 35-37. The opinion of th Court of Appeals is reported at 337 Federal 2d 68 and contained in the record at pages 40-47 thereof.

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1964 (R. 46). The petition for certiorari was filed on January 9, 1965, and granted on May 24, 1965 (R. 47; 381 U. S. 923). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Has Congress so clearly pre-empted the field of labor-management relations and declared it to be in th ational Interest that an individual, who becomes the unfortunate victim of a malicious and vicious libel occurring during the course of a labor relations incident has now completely lost his only effective and historical right of recourse for this most damaging injury to his person?

STATUTES INVOLVED

The particular statutes involved are Sections 7 and 8 of the National Labor Relations Act, as amended. The relevant portions of the statutes are set forth in Appendix A (pages 35 to 40, *infra*).

STATEMENT

This case is before the Court upon grant of a petition for a writ of certiorari to the Court of Appeals for the Sixth Circuit (R. 47). The Court of Appeals had concluded that *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, operated to deny to even a maliciously libeled plaintiff access to the remedies for such injury offered by the courts (R. 40, 41, 45). Rather, held the court, such an injured party must seek such relief, if any there be, that might possibly come from a "cease and desist" order of the National Labor Relations Board (R. 45).

Petitioner Linn filed his civil complaint for damages with the District Court for the Eastern District of Michigan, diversity being the basis for jurisdiction[1] on December 17, 1962 (R. 3). Petitioner stated that he "was at the times involved in 1962 an assistant general manager for the North Central Region of Pinkerton's National Detective Agency, Inc. The complaint charged that during a campaign to organize Pinkerton's employees, * * * United Plant Guard Workers of America, Local 114 and * * * Benton I. Bilbrey, President of the union local and W. T. England, its Vice-President, and one Leo J. Doyle, a Pinkerton guard, conspired to and did utter, publish, circulate and mail written matter maliciously libelling and defaming petitioner Linn" (R. 3-7).

[1] The original complaint failed to properly plead the requisites for diversity jurisdiction. An amended complaint was filed June 7, 1963 alleging necessary jurisdictional facts, (R. 38) and reincorporating the other allegations from the original complaint.

Petitioner Linn specifically charged in his lawsuit that he had been maliciously libelled in the following particulars:

a) In that he was falsely accused of lying to the Pinkerton employees;

b) In that he was falsely accused of lying to the National Labor Relations Board;

c) In that he was falsely accused of withholding from Pinkerton employees their rightfully earned wages;

d) In that he was falsely accused of committing certain criminal acts for which he would be prosecuted (R. 6, 7).

The Appeals Court accepted these statements as being "false, malicious, clearly libelous and damaging to plaintiff Linn, albeit they were relevant to the union's campaign" (R. 41).

Motion to dismiss the complaint was filed by Local 114, Bilbrey and England, the respondents in the matter now before this court.[2] The ground upon which the motion was ultimately granted (R. 39), and affirmed (R. 40, 46), was stated in its third paragraph:

> "• • • The subject matter of both counts of the complaint involve matters relating to the self organization rights and concerted activities of employes under the Labor Management Relations Act of 1947, as amended 29 U.S.C. Sec. 151 *et seq.* All

[2] Doyle, an original defendant in the District Court, did not join in the Motion to Dismiss. As will appear, the motion was granted on behalf only of the respondents here; the action against Doyle yet remains viable in the District Court, presumably to come to issue following disposition of this appeal.

> of the conduct complained of in both counts of said complaint is arguably protected by Section 7 of said statute, or prohibited by Section 8, and is within the exclusive jurisdiction of the National Labor Relations Board" (R. 8).

On December 11, 1962, six days before filing the suit, petitioner's employer (i.e., Pinkerton's) had filed an unfair labor practice charge with the National Labor Relations Board (NLRB) based upon the same scandalous material which formed the basis for petitioner's complaint (R. 13).

The acting Regional Director of the NLRB advised Pinkerton's that after investigation (a hearing was never held), no complaint would be issued. The letter from the NLRB particularized the reason for the decision:

> "The above mentioned charge against United Plant Guard Workers of America, Local 114, was based upon four allegedly objectionable leaflets prepared and circulated by an employee of your company. Such employee was not an officer or member of the charged union, nor was there any evidence that he was acting as an agent of such union. There is no evidence that the union was involved in any respect in the drafting and circulation of the leaflets. In view of the fact that the union is not responsible for the distribution of said leaflets, the charge against the union is wholly without basis" (R. 22, 23).

An appeal from this decision by the local NLRB office was taken to the General Counsel of the Board, by petitioner's employer. The General Counsel sustained the Regional Director, noting that "the evidence disclosed was insufficient to establish that the Union was responsible for the preparation or circulation of the leaflets in question by Doyle, an employee of the Company. In this connection, it was noted that Doyle, who was not a Union member, had

nether real nor apparent authority from the Union to act on its behalf. Under all the circumstances, therefore, further proceedings herein were deemed unwarranted" (R. 34).

Copies of these letters from the NLRB were made available to the District Court by respondent Bilbrey in the form of attachments to several affidavits filed by Bilbrey in support of respondents' pleadings in that Court (R. 22, 33). The District Court referred to and apparently adopted factual conclusions in the Pinkerton unfair labor charge in its memorandum opinion granting the respendents' motion to dismiss as against petitioner Linn (R. 35, 37).[3]

The record indicates the nature of the investigation of the Pinkerton complaint by the NLRB; that is, requests by the NLRB to Pinkerton and the Union for a written account of their respective positions (R. 10, 14) and the submission of an affidavit by Bilbrey to the NLRB (R. 15). There may have been other investigative activities by the Labor Board, but none concerned themselves with petitioner Linn.

As indicated by the docket entries (R. 2), no hearing has ever been held on the substance of petitioner's complaint in the District Court.

---

[3] The employer of petitioner, Pinkerton's National Detective Agency, Inc., filed a libel action against the same defendants as did petitioner. The District Court dismissed both the Pinkerton action and the Linn complaint. Pinkerton's took no appeal.

ARGUMENT

INTRODUCTION AND SUMMARY

The position of the Petitioner, Mr. William C. Linn, is, and has been, that he, *as an individual,* has access to the courts to correct and remedy the wrong perpetrated upon him because of a vicious and malicious libel. The fact that Mr. Linn is a supervisor and that the libelous statements were made by Union officials, acting in their official capacity should not operate to give the perpetrators of this wrong what amounts to virtual immunity for the wilful and malicious act of defamation of a man's character. The courts below, in passing upon the question of whether they had jurisdiction to hear such a case, or, was the issue one which had been pre-empted by the National Labor Relations Act to the "exclusive competence" of the National Labor Relations Board, have ruled that they do not have jurisdiction. In this ruling, the lower courts have failed to appreciate the true pattern of the decisions of this Court in earlier pre-emption cases: the lower courts have specifically misinterpreted this Court's decision in *San Diego Building Trades v. Garmon,* 359 U.S. 236.

A maliciously inspired case of libel is neither specifically protected or prohibited by the National Labor Relations Act. It is, however, a specific tort, which all persons are directed not to commit. (No issue of absolute privilege is involved, and for the purposes of this case, a discussion of such is ignored.) Thus, just because such a potentially damaging tort is committed against an *individual* during what the Union claims to be "an organizational campaign," no mantle of protection should be cast over the tortfeasors. To divest from the courts the power to decide the basic

issue of truth or falsity of the utterance when the allegation of such a tort is made under these circumstances, and to substitute for the court, the National Labor Relations Board, is inherently wrong, and can be dangerous. The remedial arsenal of the Board utterly fails to provide any redress for the wounded individual. Because the Board is not necessarily concerned with truth or falsity, as such, it will likely never correct the otherwise irreparable harm. At most, the Board could say, in effect, "Go, and never defame again." To maintain such a Rule of Law cannot be within the intent of Congress. And, because it could open a pandora's box filled with the vilest, most foul and damaging charges and counter-charges, the *peaceful* resolution of actual labor disputes would be well-nigh impossible.

The continued existence of the traditional remedy for malicious libel is necessary to *prevent* such unlawful activity from occurring in the course of any actual "labor dispute" —and further, to prevent any peaceful relationship from becoming a "labor dispute." Both of these ends are desideratums of national labor policy.

I.

THE DOCTRINE OF PRE-EMPTION, AS STATED IN THE GARMON DECISION, IS NOT CONTROLLING IN THIS CASE

A. Possible Import of Decisions Below.

Hard cases make bad law; and this case exemplifies that maxim. Projecting the decisions of the courts below to their logical conclusion, as lawyers often do, *Linn v. United Plant Guard Workers* can be offered as authority for the practical proposition that the Labor Management Relations Act has created privileges even greater than those found in the United States Constitution! This is not so extreme as it might seem. *Garrison v. Louisiana,* 379 U.S.

64, teaches that the knowingly false statement, and the false statement made with reckless disregard of the truth, even in the political arena, do *not* enjoy constitutional protection.

Presumably, a wittingly false statement, deliberately published with malicious intent, which was clearly libelous and damaging, would subject the author to criminal penalties; cf. *Garrison v. Louisiana.* It would certainly provide the basis for a civil action for damages. cf. *New York Times Co. v. Sullivan,* 376 U.S. 254. Yet the rule of *Linn* tells us that if this same thing were done as a *tactic in a Union's organizational campaign,* there is no more to be feared than a *possible* directive from the National Labor Relations Board, commanding that the offensive action not be repeated!

Linn, as of now, says that this is the true import of this court's decision in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236. *Linn* says, in effect, that when this Court said in *Garmon:*

> "When an activity is arguably subject to §7 or §8 of the Act,[4] the States as well as the Federal Courts must defer to the exclusive competence of the National Labor Relations Board of the danger of state interference with National policy is to be averted" (359 U.S. 236, 245),

the Court exempted from the jurisdiction of the state courts *all* of the pre-existing remedies available through those courts for *all* tortious conduct "growing out of and relevant to a Union's campaign to organize the employees of an employer subject to the National Labor Relations Act" (R. 46), with the sole exception of torts involving violence.

---

[4] National Labor Relations Act; 49 Stat. 449, as amended; 29 U.S.C. 151 et seq. 157, 158.

B. This Case is not Controlled by Garmon.

We believe that the Court of Appeals has misconceived the real lesson which emerges from those decisions of this Court, which the Court of Appeals cites; viz: *United Construction Workers v. Laburnum*, 347 U.S. 656; *United Auto Workers v. Russell*, 356 U.S. 634; *San Diego Bldg. Trades v. Garmon, supra; Local 100 etc. v. Borden*, 373 U.S. 690; and *Local 207 etc. v. Perko*, 373 U.S. 701.

(1) In *Laburnum, supra*, the Union was sued in a state court for compensatory and punitive damages, based upon the tortious conduct of the Union and its sympathizers in threatening and intimidating the Laburnum Company's employees, to the extent that the Laburnum Company lost certain of its contracts with a resulting loss of profits. It appeared that the Union organized a crowd of rough and boisterous men, some drunk, some armed, and invaded the company's work area. The Laburnum employees were advised that they had to join the Construction Workers Union. Laburnum had previously entered into agreements with another Union. Because of the labor dispute in which the company had become involved, Laburnum's clients and customers canceled their contracts.

Concededly, the Union's activities in *Laburnum* constituted an unfair labor practice under Section 8 of the Act (29 U.S.C. 158). It was argued that the National Labor Relations Board, therefore, had exclusive jurisdiction, and the State Court was pre-empted from granting its relief. This Court answered that contention, saying:

> "If Virginia is denied jurisdiction in this case, it will mean that where the federal preventive administrative procedures are impotent or inadequate, the offenders, by *coercion of the type found here,*

> *may destroy property without liability for the damage done*" 347 U.S. at 669. (Emphasis added.)

The jurisdiction of the State Court was upheld under all the circumstances.

(2) In *Russell, supra,* this Court similarly affirmed a state Court's jurisdiction and award in damages wherein the tortious conduct was also conceded to be an unfair labor practice, subject to §8 of the Act. The unlawful act charged against the Union and its agent was "malicious interference" with an employee's lawful occupation.

The "malicious interference" included blocking the entrance to the plant, threats of bodily harm and damages to an auto. Violence, or the threat of it, was clearly evident.

The principle issue of law facing the Court in *Russell* was whether the State Court had jurisdiction to hear the complaint, or whether the jurisdiction had been pre-empted by Congress, and was vested solely in the N.L.R.B. 356 U.S., 634, 640. The answer to the issue raised was:

> "It is our view that Congress has not * * * deprived a victim of *the kind of conduct* here involved [i.e., threat of violence] of common-law rights of action for all damages suffered" 356 U.S. 634 at 641, 642. (Emphasis added.)

(3) Then in *Garmon, supra,* the question of pre-emption was again raised. In *Garmon,* the California Court awarded damages for economic injuries resulting from *peaceful picketing by Unions which had not been selected as bargaining agents.* These activities, it was found,

> "constituted a tort based on an unfair labor practice under state law. In so holding the [California] Court relied on general tort provisions of the Cali-

> fornia Civil Code * * *, as well as state enactments dealing specifically with labor relations" 359 U.S. 236, at 239.

State jurisdiction to award damages for *this type of tortious conduct* was found to have been extinguished by the National Labor Relations Act. The Labor Board was held to have primary jurisdiction in this kind of situation. The *Garmon* Court carefully pointed out that state jurisdiction was allowed to prevail in *Laburnum* (and *Russell*) because of the "type of conduct" present in *those* cases. It necessarily follows that the decision in *Garmon* that state jurisdiction was pre-empted was occasioned by the *type of conduct* described by the set of facts there presented.

(4) In the *Borden* case, *supra,* state jurisdiction to award damages was held to have been pre-empted where a Union member claimed to have been barred from a particular job because a Union business agent refused to refer him to a particular bank construction project. (The member was referred to, and did obtain employment on, other construction projects, however.) This Court held that

> "the first inquiry, in any case in which a claim of federal pre-emption is raised, must be whether the *conduct* called into question may reasonably be asserted to be subject to Labor Board cognizance" 373 U.S. 690 at 694. (Emphasis added.)

The conduct which Borden claimed to constitute a tortious interference with his right to work could have been (1) a violation of §8(b)(1)(A) of the Act, in that the Union agent restrained Borden from exercising his Section 7 right to refrain from observing the Union's rules; or (2) a violation of Section 8(b)(2), by causing a prospective employer to discriminate against Borden; or (3) concerted

Union activity protected by Section 7 of the Act. But in any event, Borden's claim for damages "was focused principally, if not entirely, on the Union's actions with respect to Borden's efforts to obtain employment." (373 U.S. 690 at 697.)

The opinion of the Court concluded by stating:

> "In the present case the *conduct* on which the suit is centered, whether described in terms of tort or contract, is conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction to apply federal standards" 373 U.S. 690 at 698. (Emphasis in original.)

(5) Continuing, in *Local 207 v. Perko, supra,* state jurisdiction to award damages was once again found to have been pre-empted. Perko was employed by Pollack Company as a "foreman" or a "supervisor." He was also a member of Local 207 of the Iron Workers Union (i.e., the petitioner). Because of certain activities of Mr. Perko, an inter-union jurisdictional dispute arose and the Iron Workers members would not work for Perko. Perko was laid off because of his dispute with his Union. Thereafter, Perko did not obtain employment as a foreman or as a superintendent.

In the factual context presented, the Union's activities in causing Perko's discharge and preventing his re-employment as foreman or superintendent were likely a violation of either Section 8(b)(1)(A)—a coercion of Perko for failure to live up to a Union rule; or a violation of Section 8(b)(2)—causing the employer to discriminate against Perko; or a violation of several other unfair practices prescribed by Section 8. Whatever violation the activities might have been, as the Court pointed out, the Labor Board could have provided an adequate remedy.

Returning to *Local 100 v. Borden, supra,* for a moment, the Court in that case profoundly noted:

> "It is not the label affixed to the Court of action under state law that controls the determination of the relationship between state and federal jurisdiction. Rather, as stated in *Garmon*, 359 U.S. at 246, '(o)ur concern is with delimiting *areas of conduct* which must be free from state regulation if national policy is to be left unhampered' " 373 U.S. 690 at 698. (Emphasis added by Court in principal citation.)

The Court has up to now "delimited" only certain areas of conduct. Violence has been ruled on in *Laburnum* and *Russell*, as well as in other cases. See, e.g., *Youngdahl v. Rainfair*, 355 U.S. 131. Peaceful picketing for Union recognition has been ruled on in *Garmon*. Direct interference with obtaining employment was the subject of *Borden* and *Perko*. Peaceful picketing to force hiring of Union labor was considered in *Local 438 v. Curry*, 371 U.S. 542. This is not necessarily an all-inclusive list of the areas of conduct considered in the cases as "delimited" for pre-emption purposes. But the fact remains that *malicious libel and defamation* has never been ruled on as an "area of conduct." That question faces the Court in this matter.

C. Standards For Deciding This Case.

The point we are striving to make is that *Garmon* is not the end of the pre-emption road. Nor does *Garmon* state the totality of the pre-emption doctrine. *Garmon* dealt with a particular set of facts wherein the unlawful activity for which money damages were assessed was *inherently* an unfair labor practice. Likewise, in *Borden* and *Perko* the unlawful activity was *inherently* an unfair labor practice. The *focus* of the remedies sought in those cases was directly on the regulation of labor-management relations. Money damages, though sometimes significant in amount, were essentially ancillary to the respective actions.

The opposite is true of the factual postures in *Laburnum* and *Russell.* Money damages for real injuries were th principal *focus* of those lawsuits. If there was any effect upon labor-management relationship, it was a coincidence arising out of the circumstance that the defendant composed one part of that relationship. But the central fact remained that the wrongful act could have been perpetrated with any cast of characters. It did not need a labor-management incident to give it birth.

The true distinction, then, between the *Laburnum-Russell* line of cases on the one hand, and the *Garmon-Borden-Perko* line on the other, is the distinction suggested by the then professor Archibald Cox writing in the Harvard Law Review in 1954:

> "May we not say therefore, that the distinction [pre-emption vis.-a-vis. no pre-emption] should be drawn between statutes and rules of decision having general application and laws which deal with labor-management relations *as such?* (Emphasis in original.) (Cox, *Federalism in the Law of Labor Relations,* 67 Harv. Law Rev. 1297, at 1321.)

Obviously, a civil action for defamation is based upon codes of conduct imposed upon *all* persons. The actions in The civil actions in *Laburnum* and *Russell* were based upon codes of conduct imposed upon *all* persons. The actions in *Garmon-Borden-Perko* had a different genesis; they grew out of—*and could only grow out of*—some intereference with the employer-employee relationship.

The true lesson of these cases, which the Court of Appeals has not applied to the situation presented here, is this:

1. State courts continue to maintain their historic power to redress and remedy injuries caused to citizens by those acts of commission or omission which are con-

trary to the general code of behavior, established to provide peace and good order among its citizens, without regard to the fact that such injury might also—in another context—be an unfair labor practice.[5]

2. But where an injury is caused by a wrong which wrong is *by definition* an unfair labor practice, the primary jurisdiction to ameliorate the harm lies with the National Labor Relations Board.

Applying the foregoing "lesson" as a standard for determining the issue presented in this matter, the answer is clear: Because an action for maliciously concocted libel is based upon a standard of conduct imposed on everyone, the State Courts (although in this instance, a Federal Court, because of diversity) are not pre-empted from jurisdiction to hear, and decide, a complaint alleging malicious libel, even though the parties to the lawsuit happen to be on opposite sides of the labor-management arena.[6]

---

[5] Especially does this hold true when the proscribed acts are maliciously inspired and calculated to do harm; i.e., to injure or destroy person or property. The Court will remember that maliciousness is specifically alleged in petitioner Linn's complaint.

[6] Honeesty prompts this comment at this point. Perhaps most of the foregoing is an unduly legalistic approach to a question best presented in terms of common sense and fundamental concepts of fairness. As a very practical matter, no true personal injury, as that term is understood in the traditional common-law concept of the law of torts, can ever be considered by decent people to be "a proteced activity under §7 of the National Labor Relations Act." The underlying precepts to the national labor policy which Congress has legislated—as either stated or implied in §1 of the National Labor Relations Act (29 U.S.C. 151)—are fairness of treatment, respecting the rights of the opposition, protection against strife, equations of respective positions.

By the same token all true personal injuries, as hazily defined above, when committed in the course of labor-management incident, or at any other time for that matter, *must* be "unfair labor practices". Relieving a tortfeasor from liability for causing such injuries has to depend upon

(Continued on next page)

II.

MALICIOUS LIBEL IS NOT A PROTECTED CONCERTED ACTIVITY

The District Court based its order of dismissal "for want of jurisdiction of the subject matter as to [respondents] United Plant Guard Workers of America, Benton I. Bilbrey and W. T. England" (R. 39) upon the grounds that the "false and defamatory publication * * * would arguably constitute an unfair labor practice under Section 8(b) of the National Labor Relations Act * * *". And the Circuit Court's opinion (R. 40-47) inferentially agreed with this holding. This District Court in its opinion, however, did quote that paragraph from the *Garmon* decision which includes the "protected by Section 7" phrase (359 U.S. 236 at 244) (R. 36), although the lower court did not appear to consider the activities in this case as "protected."

In his memorandum, in response to the Court's invitation of March 8, 1965, to file a brief expressing the views

---

(Continued from preceding page)

some Rule of Law other than the artificial standard of simply being "arguably subject to the Act."

Should we abandon these general principles, we are no longer a nation under law, dedicated to the rule of law and rights of man; when we abandon these general principles, we become subject to a government of men.

While the foregoing is not particularly sophisticated, it is not for that reason, unsound.

There comes a point in time and in every society when the "National Interest" is no longer best served by subjugation of the interests of the individual. We suggest that restrictions, such as have been so far sanctioned in *this case*, against protection of an individual's personal honor, reputation, and integrity, is that point.

Due respect for the Forum to which we address this brief compels us to make this argument in a footnote. But with all sincerity, we believe in its application to the case at hand.

of the United States, the Solicitor General nevertheless suggested that a statement defamatory under state law might be protected by Section 7 of the Act. (Memorandum for the United States, this case, p. 4). The respondents do not seem to agree that libel is "protected activity" (Reply by Respondents to Memorandum for United States, this case, p. 2) nor do we on behalf of petitioner, Mr. Linn.

The legislative history of Section 7 of the Taft-Hartley Act likewise does not support any "protected" theory for defamation. The purpose for and the underlying philosophy of Section 7 of the Act is fully stated in the report of the House and Senate conferees, after the representatives of those two bodies had met to iron out the differences between the Hartley Bill in the House (H.R. 3020, 80th Cong. 1st Sess.) and the Taft Bill in the Senate (S. 1126, 80th Cong., 1st Sess.). The Conference Committee reported on what was to be enacted as Section 7 of the National Labor Relations Act [29 U.S.C. 157], as follows:

> "*Rights of Employees.*
>
> "Both the House Bill and the Senate amendment in amending the National Labor Relations Act preserved the right under section 7 of that act of employees to self-organization, to form, join, or assist any labor organization, and to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. The House bill, however, made two changes in that section of the act. *First,* it was stated specifically that the rights set forth were not to be considered as including the right to commit or participate in unfair labor practices, *unlawful concerted activities,* or violations of collective bargaining contracts. *Second,* it was specifically set forth that employees were also to have the right to refrain from self-organization, etc., if they chose to do so.

"The first change in section 7 of the act made by the House bill was inserted by reason of *early* decisions of the Board to the effect that the language of section 7 *protected concerted activities regardless of their nature or objectives.* An outstanding decision of this sort was the one involving a 'sit down' strike wherein the Board ordered the reinstatement of employees who engaged in this un[l]awful activity. Later the Board ordered the reinstatement of certain employees whose concerted activities constituted *mutiny.* In both of the above instances, however, the decision of the Board was *reversed* by the Supreme Court. More recently, a decision of the board ordering the reinstatement of individuals who had engaged in mass picketing was reversed by the Circuit Court of Appeals (*Indiana Desk Co. v. N.L.R.B.,* 149 Fed. (2d) 987) (1944).

"Thus the *courts* have *firmly* established the rule that under the *existing provisions of section 7* of the National Labor Relations Act, employees are *not* given any right to *engage in unlawful or other improper conduct.* In its most recent decisions the Board has been consistently applying the principles established by the courts. For example, * * *. [Four specific illustrations are given here.] The reasoning of these recent decisions appears to have had the effect of overruling such decisions of the Board as that in *Matter of Berkshire Knitting Mills* (46 *N.L.R.B.* 995 (1943)), wherein the Board attempted to distinguish between what it considered as major crimes and minor crimes for the purpose of determining what employees were entitled to reinstatement.

"By reason of the foregoing, it was believed that the specific provisions in the House bill excepting unfair labor practices, *unlawful* concerted activities, and violation of collective bargaining agreements from the protection of section 7 were *unnecessary.* Moreover, there was real concern that the *inclusion*

of such a provision might have a *limiting* effect and make *improper conduct* not specifically mentioned *subject* to the *protection* of the act.

"In addition, other provisions of the conference agreement deal with this particular problem in general terms. For example, in the declaration of policy to the amended National Labor Relations Act adopted by the conference committee [29 U.S. Code §151, fourth paragraph], it is stated in the new paragraph dealing with improper practices of labor organizations, their officers, and members, that the 'elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.' This in and of itself demonstrates a clear intention that these undesirable concerted activities are *not* to have any protection under the act, and to the extent that the Board in the past has accorded protection to such activities, the conference agreement makes such protection *no longer* possible. Furthermore, in section 10 (c) [29 U.S.C. 160 c] of the amended act, as proposed in the conference agreement, it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay if such individual was suspended or discharged for cause, and this, of course, applies with equal force *whether or not* the acts constituting the cause for discharge were committed in connection with a *concerted activity.* Again, inasmuch as section 10 (b) [29 U.S.C. 160 b] of the act, as proposed to be amended by the conference agreement, requires that the rules of evidence applicable in the district courts shall, so far as practicable, be followed and applied by the Board, proof of acts of unlawful conduct cannot hereafter be limited to proof of confession or conviction thereof.

"The second change made by the House bill in section 7 of the act (which is carried into the conference agreement) also has an important bearing

> on the kinds of concerted activities which are protected by section 7. That provision, as heretofore stated, provides that employees are also to have the right to refrain from joining in concerted activities with their fellow employees if they choose to do so. Taken in conjunction with the provisions of section 8 (b) (1) of the conference agreement (which will be hereafter discussed), wherein it is made an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of rights guaranteed in section 7, it is apparent that many forms and variet[i]es of *concerted* activities which the Board, particularly in its *early* days, regarded as *protected* by the act will *no longer* be treated as having that protection, since obviously persons who engage in or support unfair labor practices will not enjoy immunity under the act." (Emphasis supplied.) (H.R. Rep. 510, 80th Cong., 1st Session, pp. 38-40, 1 Leg. Hist. L.M.R.A. 542-544.)

Senator Taft, one of the conferees, reported to his colleagues in the Senate and presented a detailed summary of the differences between the original Senate bill and that which emerged from the Conference Committee. His remarks, on June 5, 1947, appear at 93 Cong. Rec. 6441-5, and in 2 Legislative History of the Labor Management Relations Act 1536-44. The Senator said, in part, concerning Section 7:

> "By reason of the foregoing, it was believed that the specific provisions in the House bill excepting unfair labor practices, unlawful concerted activities, and violation of collective-bargaining agreements from the protection of section 7b [sic] were unnecessary. Moreover, there was a fear that the inclusion of such a provision might have a *limited* [limiting] effect and make unlawful activities *other* than those *specifically* mentioned *subject* to the *protection* of act. Other provisions of the conference

agreement deal with this particular problem in general terms. For example, in the declaration of policy to the new National Labor Relations Act adopted by the conference committee, it is stated with reference to undesirable practices of labor organizations, their organization, their officers, and members that the 'elimination of such practices is a necessary condition to the assurance of the rights herein guarteed.' *This demonstrates a clear intention that these undesirable concerted activities are not to have any protection under the act,* and to the extent that the Board in the past has accorded protection to such activities, *the conference agreement makes such protection no longer possible.* Furthermore, in section 10 (c) [29 U.S.C. 160 c] as proposed in the conference agreement, it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay is such individual was suspended or discharged for cause." (Emphasis supplied.) (2 Legis. Hist. L.M.R.A. p. 1539).

Subsequently, Section 7 of the Act (29 U.S.C. 157) was passed by Congress, as the Committee proposed, and in the following form:

> "Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

The reports and remarks quoted above thus make it unmistakably clear that Section 7 of the N.L.R.A. shall never be construed to protect *unlawful* activity, whether that activity be "concerted" activity or otherwise. It is furthermore unmistakably clear that *unlawful* conduct was not to be defined solely in terms of the unfair labor practices otherwise defined in the act. The Report to the House speaks in terms of unfair labor practices, unlawful activities and violation of collective bargaining agreements, and then indicates, in the fourth paragraph of the portion of the Report quoted above, that these terms are to have a broad interpretation and are not to be limited to such improper conduct as is specifically mentioned in the Act itself. There is likewise no doubt that, in Michigan, where the cause of action arose, the false and malicious imputation of criminal conduct in another is *unlawful. Line v. Spies,* 139 Mich. 484 (1905). Not only does such activity give rise to a civil action for damages, it is also, in Michigan, a crime. See, Michigan Comp. Laws '48, §750.370; M.S.A. 28.602.

We submit, therefore, that any suggestion that the *type of conduct,* as described in the Complaint filed in this matter, is protected activity under Section 7 of the Act, is palpably in error.

III.

LIBEL, AS SUCH, IS NOT AN UNFAIR LABOR PRACTICE

In a case in which federal pre-emption of the subject matter is raised as an issue, as did the respondents here, the first inquiry must be whether the conduct in question may be reasonably asserted to be subject to National Labor Relations Board Cognizance, *Local 100 of United Ass'n of Journeymen and Apprentices v. Borden,* 373 U.S. 690.

That is to say, is the conduct complained of *prohibited* by Section 8, or *protected* by Section 7 of the Act? We have demonstrated that a malicious libel imputing crime, because it is an *unlawful* activity, cannot be considered protected by the Act.

Insofar as the prohibited activities are concerned, we urge the Court to give literal meaning, in this case, to Section (c) of the Act (29 U.S.C. 158 (c)). In full, 8 (c) says:

> "*The expressing of any views*, argument, or opinion, or the dissemination thereof, whether *in written*, printed, graphic, or visual *form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act*, if such expression contains no threat of reprisal or force or promise of benefit." (Emphasis added.)[7]

Here, in express and unequivocal language, Congress has stated what *shall not be* an unfair labor practice, cognizable as such by the National Labor Relations Board, namely: *words*. It should go without saying that the Board is not a court of general jurisdiction over private rights. *Guss v. Utah Labor Relations Board*, 373 U.S. 1, (dissenting opinion). When it was created by Congress in the National Labor Relations Act, (49 Stat. 449, as amended, 29 U.S.C. 151 *et seq.*), the National Labor Relations Board was given specific powers and duties. Among those powers and duties is the prevention of any person from engaging in those unfair labor practices listed in Section 8 of the Act. (See generally, §10 of the Act, 29 U.S.C. 160). But, by the specific terms of Section 8 (c), the use of words *is not* an unfair labor practice. *Words* are not then "argu-

---

[7] Threats of reprisal, etc., are not contained in the libelous document and are not of concern in the instant case.

ably subject to Section 8 of the Act." *San Diego Building Trades v. Garmon, supra.* To put the proposition another way, the use of words *is not* such activity which may reasonably be asserted to be subject to Labor Board cognizance, cf. *Local 100 etc. v. Borden,* 373 U.S. 690, 694.

The legislative history of 8 (c) indicates that in the context of the instant case, an action based upon a malicious libel *is not* such an instance where the Labor Relations Act "leaves much to the states, though Congress hes refrained from telling us how much." *Garner v. Teamsters Union,* 346 U.S. 485, 488. On the contrary, the legislative history of Section 8 (c) of the Act conclusively demonstrates that this Section was added to the Law *to eliminate from the Labor Board's cognizance*—and as an unfair labor practice—*speech. Cf. Local 100 v. Borden, supra.*

House Report No. 245, on House Bill 3020, dated April 11, 1947 (H.R. Rep. No. 245, 80th Cong. 1st Sess., p. 33, 1 Leg. History, L.M.R.A. 324) concerning that part of the legislation which ultimately became Section 8 (c) of the Labor Act, reads:

> "Section 8 (d) (i).—This guarantees free speech to employers, employees, and unions. Although the Labor Board says it does not limit free speech, its decisions show that it uses against people what the Constitution says they can say freely. Thus, if an employer criticizes a union, and later a foreman discharges a union official for gross misconduct, the Board may say that the official's misconduct warranted his being discharged, but infer, from what the employer said, perhaps long before, that the discharge was for union activity, and reinstate the official with back pay. It [i.e., the Labor Board] has similarly abused the right of free speech in abolishing and penalizing unions of which it disapproved but which workers wished as their bar-

gaining agents. *The bill corrects this,* providing that nothing that anyone says shall constitute or be evidence of an unfair labor practice unless it, by its own express terms, threatens force or economic reprisal. This means that a statement may not be used against the person making it, unless it, standing alone, is unfair within the express terms of Sections 7 and 8 of the amended Act." (Emphasis supplied.)

Almost contemporaneously the Senate Report, concerning its version of the original 1947 Amendments to the Labor Act, was published. In support of the need for what was to ultimately become Section 8 (c), the Senate Report said:

"Section 8 (c): Another amendment to this section would insure both to employers and labor organizations full freedom to express their views to employees on labor matters [provided that they] refrain from threats of violence, intimation of economic reprisal, or offers of benefit. The Supreme Court in *Thomas v. Collins* (323 U.S. 516) held, contrary to some earlier decisions of the Labor Board, that the Constitution guarantees freedom of speech on either side in labor controversies and approved the doctrine of the *American Tube Bending* case, (134 F2d 993). The Board has placed a limited construction upon these decisions by holding such speeches by employers to be coercive if the employer was found guilty of some other unfair labor practice, even though severable or unrelated (*Monumental Life Insurance,* 69 N.L.R.B. 247) or if the speech was made in the plant on working time (*Clark Brothers,* 70 N.L.R.B. 60). The committee believes these decisions to be too restrictive and, in this section, provides that if, under all the circumstances, there is neither an expressed or implied threat of reprisal, force, or offer of benefit, the

Board shall not predicate any finding of unfair labor practice upon the statement. The Board, of course, will not be precluded from considering such statements as evidence." (Senate Report No. 105, 80th Cong. 1st Sess. pp. 23, 24, April 17, 1947; 1 Leg. Hist. L.M.R.A. 429-430.)

Subsequently, as the Court knows, the House and Senate versions of the 1947 Labor Act were submitted to Conference Committee. On June 3, 1947, the Conference Committee's explanation on what has now become Section 8 (c) was issued:

"(5) Both the House bill and the Senate amendment contained provisions designed to protect the right of both employers and labor organizations to free speech The conference agreement adopts the provisions of the House bill in this respect with one change derived from the Senate amendment. It is provided that expressing any views, argument, or opinion or the dissemination thereof, whether in written, printed, graphic, or visual form, is not to constitute or be evidence of an unfair labor practice if such expression contains no threat of force or reprisal or promise of benefit. The practice which the Board has had in the past of using speeches and publications of employers concerning labor organizations and collective bargaining arrangements as evidence, no matter how irrelevant or immaterial, that some later act of the employer had an illegal purpose gave rise to the necessity for this change in the law. The purpose is to protect the right of free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination." (H.R. Conf. Rep. No. 510, 80th Cong. 1st Sess. p. 45, 1 Leg. Hist. L.M.R.A 549)

Senator Taft then reported to his colleagues in the Senate, on June 5, 1947, concerning the Conference Committee's report, as follows:

> "Subsection (c) relating to the right of employers, employees, and labor organizations to express opinions and views freely, conforms substantially with the language of subsection 8 (d) (1) of the House bill and is a substitute for Section 8 (c) of the Senate amendment The House conferees were of the opinion that the phrase 'under all the circumstances' in the Senate amendment was ambiguous and might be susceptible of being construed as approving certain Board decisions which have attempted to circumscribe the right of free speech where there were also findings of unfair labor practices. Since this was certainly contrary to the intent of the Senate, as the accompanying report of the committee with respect to this subsection indicates, the Senate conferees acceded to the wish of the House group that the intent of this Section be clarified." (2 Leg. Hist. L.M.R.A. 1540-1541.)

What then clearly appears as the sense of the Congress is a delimiting of an area of conduct *which must be free from National Labor Relations Board* regulation. cf. *San Diego Building Trades v. Garmon,* 359 U.S. 236, 246. That is to say (with certain specific exceptions not here applicable) *speech is not pre-empted to the "exclusive competence" of the Labor Board."* 359 U.S. at 245.

And, since "Congress could pre-empt as much or as little of this interstate field as it chose," *Retail Clerks International Ass'n v. Schermerhorn,* 375 U.S. 96, 99, it would torture the pre-emption doctrine to now find that a *specific denial of pre-emption* withdraws from the States the jurisdiction of their courts to hear a cause based upon a faleshood, deliberate and calculated, or made with reck-

less disregard of the truth. Such a statement bears no protection from a libel action in the political arena, *Garrison v. Louisiana,* 379 U.S. 64, and we can see no sound reason for sanctioning such a statement in the area of labor relations.

IV.

RETAINING IN THE LOCAL COURTS THE JURISDICTION TO HEAR AND DECIDE CIVIL ACTIONS BASED UPON MALICIOUS LIBEL CONSTITUTES NO THREAT TO NATIONAL LABOR POLICY OR THE NATIONAL LABOR RELATIONS BOARD

A. The Courts and the N. L. R. B. Have Different, Non-Competing Interests.

The Fourth Circuit Court of Appeals stated the reason for the fundamental soundness of the above proposition in *Bouligny v. Steelworkers* (1964) 336 F. 2d 160, (cert. granted on another issue, 370 U.S. 958). Through Judge Bell, the court there said:

> "'The National Labor Relations Act is concerned only with the *coercive* effect of an alleged libel, and not with its character as a common law tort." (336 F2d 160 at 165.) (Emphasis supplied.)

That is, the National Labor Relations Board is not basically concerned with the truth or falsity of any given statement. (Query whether the Board is, under most circumstances, legitimately concerned with any statement. See argument advanced re: §8 (c), above). The concern of the Labor Board is whether there has been an unfairly coercive or restraining influence inserted into the context of a particular labor-management dispute. (Or, whether the complained of conduct is protected; but if protected,

it cannot, by definition, be unfair. As demonstrated earlier, the conduct *here* complained of is not protected.) The concern would have to be with the statement itself, and not with its veracity. See, Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act,* 78 Harv. Law Rev. 38, at 82-91.

On the other hand, "the major purpose of libel actions is the vindication of the individual's interest in his reputation" Note, 78 Harv. Law Rev. 1670 at 1673. The touchstone of this interest *is* truth or falsity. And this central issue can be determined in the libel action "without regard to the merits of the labor controversy." See, *International Union v. Russell,* 356 U.S. 650 at 649 (dissenting opinion). The areas of inquiry by the two tribunals, i.e., the N.L.R.B. and the Court—are not necessarily likely to overlap. Indeed, by the very nature of the desired end product of the inquiry they are very likely to run at right angles to each other. Even the element of damages in the civil defamation suit is often a secondary issue. Restoration and continuation of the good personal name and reputation of the victim is, many times, the central purpose of the lawsuit.

It follows then that because of these two basically and distinctly different interests, there can be no real interference with national policy in allowing the local courts to retain their traditional jurisdiction to hear causes based upon an allegation of malicious libel, as is the charge in this case. We suggest the fact to be that, in this area, there cannot even be the possibility of two separate tribunals coming to two separate and competing conclusions based upon the same set of facts. For, if the Labor Board has to decide the question of restraint or coercion, and degree thereof, it obviously will have no relationship to

a trial court's conclusions as to truth or falsity. And the opposite is equally true: A trial court's determination concerning veracity of a particular statement should not affect the broader question of restraint and/or coercion before the Board.[8] In short, the conclusions of the respective tribunals cannot compete because they are not deciding the same issues.

B. Upholding the Rule of the Lower Courts Could Seriously Impair Labor Relations Generally.

It should be emphasized here that because of the factual background of this case, the precise question now before the Court is whether an *individual* can maintain a course of action because of a malicious libel perpetrated in the course of a labor relations incident.[9] Not only does the National Labor Relations Board fail to have an appropriate remedial weapon in its arsenal under these circumstances but, we strongly urge that denying the courts jurisdiction to hear a case *of this nature* would have the net effect of undermining the national policy. That policy is stated in Section 1 (b) of Labor Management Relations Act of 1947 (61 Stat 136; 29 U.S.C. 141 (b)):

---

[8] As a practical matter, proceedings before the National Labor Relations Board in any given situation are likely to be concluded long before the end to any civil action pending in a trial court. And since the defamation action can be "decided without regard to the merits of the Labor controversy" *UAW v. Russell, supra*, it is not likely that the "old wounds" of the dispute will be kept open.

[9] As indicated earlier in the Statement of the case, the employer of the petitioner also filed a complaint because of the same libelous statements claiming damages to the employer. This action was dismissed in the District Court and was not appealed. (R. 35-39)

"SHORT TITLE AND DECLARATION OF POLICY

Section 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interfers with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

By failing to allow a competent court to ascertain the truth where an individual has been libeled, a situation is created analogous to the failure to provide compensation for crippling injuries caused by an industrial accident, an inequity which has been corrected in many states by Workmen's Compensation laws. It does not require extended argument to point out that unless some remedy is provided

for the crippling injury, a festering malcontent will lie within the injured party. The animus will most certainly be directed towards the thing (e.g., the Company) considered by the individual to be responsible for the harm. And the same will hold true for the unredressed libel. Human beings, being what they are, will always retain an area of doubt about a person who has been villified and who has not corrected his accusers. Now, we are told by the lower courts, there is no effective way that such a challenge can be made in the labor-management context. Then, can it reasonably be said that where a supervisor's personal conduct and morals have been challenged and he is prevented from showing the falsity of the accusations, that industrial strife will be minimized? The answer is obviously: NO. Because in such a situation, two results can be reasonably expected: (1) the supervisor will retain an animus toward his accusers (and if the accusers be Labor, no sound labor-management relationship can be expected) and (2) the supervisor will certainly lose whatever power and respect he might have, need and enjoy to carry out his supervisor's responsibilities.

The situation would be the same if the libeled individual was a Union official and the degrading statement came from the management side. We argue for no distinction between the rights, responsibilities and remedies available to the parties. We do argue for a recognition that a civil action for damages is the most effective preventative against the maliciously inspired libel. And we argue that maliciously inspired libel has absolutely no place in any phase of our society. It certainly has no place in the labor-management relationship; a relationship characterized by the Respondents as one which is "often close to violence" (Brief in Opposition to Petition for Certiorari, p. 7). It may, therefore, reasonably be asserted that failure to

recognize the traditional cause of action for malicious libel, in the labor management relationship, could actually undermine the very policies which Congress has sought to promote. Cf. *Meyer v. Teamsters*, 416 Pa. 401, 206 A2d 382 (petition for certiorari pending). It may further be asserted that there is no sound, demonstrated need to preempt state jurisdiction in this area. Nor is there any clearly expressed Congressional direction depriving the states of the power to act.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case should be remanded to the District Court for reinstatement on the trial docket.

Respectfully submitted,

DONALD F. WELDAY,

DONALD F. WELDAY, JR.,
Northland Towers,
Southfield, Michigan.

WELDAY, O'LEARY, GOLDSTONE & BICHAN,
Of Counsel.

September 15, 1965.

APPENDIX A

SHORT TITLE AND DECLARATION OF POLICY

Section 1. (a). This Act may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

NATIONAL LABOR RELATIONS ACT

FINDINGS AND POLICIES

Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

DEFINITIONS

Sec. 2. When used in this Act—

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

RIGHTS OF EMPLOYEES

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Section 8:

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

PREVENTION OF UNFAIR LABOR PRACTICES

Section 10. (a) The Board is empowered, as hereinafter provided to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer of labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging

a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 45

WILLIAM C. LINN,
Petitioner,
v.
UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 114, a Labor Association, LEO J. DOYLE, BENTON I. BILBREY and W. T. ENGLAND,
Jointly and Severally,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 114, BENTON I. BILBREY AND W. T. ENGLAND

HAROLD A. CRANEFIELD,
Counsel for Respondents United Plant Guard Workers of America Local 114, Benton I. Bilbrey and W. T. England,
2142 First National Building,
Detroit, Michigan 48226.

LIVINGSTON, GREGORY, VAN LOPIK and CRANEFIELD,
WINSTON L. LIVINGSTON,
NANCY JEAN VAN LOPIK,
Of Counsel.

SUBJECT INDEX

CITATIONS

Cases

Statutes

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 45

WILLIAM C. LINN,
Petitioner,
v.
UNITED PLANT GUARD WORKERS OF AMERICA,
LOCAL 114, a Labor Association,
LEO J. DOYLE, BENTON I. BILBREY
and W. T. ENGLAND,
Jointly and Severally,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 114, BENTON I. BILBREY AND W. T. ENGLAND

QUESTION PRESENTED

Does a state or federal court have jurisdiction over the subject matter of a civil action for libel where such action is based upon activities which are arguably subject to Section 7 or Section 8 of the National Labor Relations Act, as amended?

STATEMENT

The statement of the case contained in Petitioner's brief is substantially correct, except for the omission of the following facts which these respondents deem material.

From about the first of November, 1962, to at least the date this suit was commenced, United Plant Guard Workers of America, Local 114, had been engaged in an organizational drive in the Detroit area among the employees of Pinkerton's National Detective Agency, Inc., petitioner's employer (R. 9, 4).

The alleged false and defamatory matter allegedly published on or about December 7, 1962, was set forth in Counts I and II of the complaint, as follows:

> "(7) Now we find out that Pinkerton's has had a large volume of work in Saginaw, they have had it for years.
>
> United Plant Guard Workers now has evidence,
>
> A. That Pinkerton has 10 jobs in Saginaw, Michigan.
>
> B. Employing 52 men.
>
> C. Some of these jobs are 10 years old!
>
> (8) Make you feel kind of sick and foolish.
>
> (9) The men in Saginaw were deprived of their *right* to VOTE in three N.L.R.B. elections. Their names were not summited (sic). These guards were voted into the Union in 1959! These Pinkerton guards were *robbed* of pay increases. The Pinkerton managers (sic) were LYING to us—all the time the contract was in effect.
>
> No doubt the Saginaw men will file criminal charges.
>
> Somebody may go to Jail!" (R. 4, 5, 6.)

In Count I, petitioner alleged that he "is and was one of the managers referred to by defendants" (R. 5). In Count II, petitioner alleged that he "is specifically named elsewhere in the publication as one of the managers referred to in the words and material quoted immediately above" (R. 6).

On June 5, 1963, the district court filed its Memorandum Opinion Granting Defendants' Motion to Dismiss in which the court stated that the rule of *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), required dismissal of the action as to these respondents (R. 36, 37). On appeal, the Sixth Circuit affirmed on the same grounds (R. 40-46).

ARGUMENT

Summary of Argument

The alleged defamatory lenguage which is the subject matter of the present action is arguably protected under the National Labor Relations Act as amended (61 Stat 136, 73 Stat. 519, 29 U.S.C. 151, et seq.), hereinafter called the "Act", since the statements were made with respect to an "employer" as defined in the Act and were relevant to the objectives of an organizing campaign. The language may also be arguably prohibited by Section 8 of the Act.

Since *Hill v. Florida* 325 U.S. 538 (1945), it has been consistently held that states may not interfere with activities which are protected under the Act. *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), and later cases extended this rule to activities which may be *arguably* protected or prohibited.

To make an exception to the rule prohibiting interference with rights which may be federally protected would be contrary to Congressional intent and endanger the very essence of the preemption doctrine. In fact, the creation of any additional exceptions to the *Garmon* rule would be a retreat from a workable formula to doubt and endless litigation proposing further exceptions.

Moreover, the facts of this case show no compelling need for an additional exception to *Garmon* since the defamation alleged is not serious and the National Labor Relations Board has already made an administrative determination with respect to the responsibility of these respondents for its publication.

I.

THE ACTIVITIES COMPLAINED OF IN THIS ACTION ARE ARGUABLY SUBJECT TO SECTION 7 OR SECTION 8 OF THE NATIONAL LABOR RELATIONS ACT.

For the first time in this case, petitioner has questioned whether the activity complained of in this action is subject to Sections 7 or 8 of the National Labor Relations Act. Petitioner asserts that malicious libel is not a protected concerted activity and that libel, containing no threats or promises, is not an unfair labor practice.

The question, however, is not whether an activity is subject to Section 7 or 8 of the National Labor Relations Act, but whether the activity is *"arguably* subject to Sec. 7 or Sec. 8 of the Act." *San Diego Building Trades Council v. Garmon, supra.* In the *Garmon* case, it was stated:

> "At times it has not been clear whether the particular activity regulated by the States was governed by §7 or §8 or was, perhaps, outside both these sections. But courts are not primary tri-

> bunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board." (p. 244)

Or, as was stated in *Local 100, United Association of Journeymen and Apprentices v. Borden*, 373 U.S. 690, (1963):

> "Thus the first inquiry, in any case in which a claim of federal preemption is raised, must be whether the conduct called into question may reasonably be asserted to be subject to Labor Board cognizance." (p. 694)

> "It is sufficient for present purposes to find, as we do, that it is reasonably 'arguable' that this matter comes within the Board's jurisdiction." (p. 696)

Respondents have heretofore taken no position as to whether the alleged defamatory statements were arguably protected or prohibited under the Act. The Board might find in such statements a threat of criminal prosecution and an unfair labor practice under Section 8(b)(1)(B). Respondents believe, however, that such statements are arguably subject to the protection of Section 7 of the Act.

Section 7 guarantees to employees the "right to self-organization, to form, join or assist labor organizations * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *" Freedom of speech is an essential and integral part of the rights guaranteed by Section 7. That the principles of free speech apply to the labor field was recognized by Congress when it enacted Section 8(c) of the Act and was long ago recognized by this Court in *Thomas v. Collins*, 323 U.S. 516 (1945).

This is not to say that all statements made by employees or their unions during organizing campaigns, collective

bargaining sessions or in the context of a labor dispute are protected. One example may be found in the case of *NLRB v. Blue Bell, Inc.* (5th Cir. 1955), 219 F.2d 796, where it was held that an employee who wrote a letter, circulated to other employees prior to a representation election, in which letter she repeatedly called a vice-president of the employer a liar, was not engaged in a protected activity.

On the other hand, in *Bettcher Mfg. Corp.*, 76 NLRB 526 (1948), where an employee, in effect, called the employer's president a "crook and a liar" and impliedly accused him of juggling company books during a bargaining session, the statement was held to be protected. And, in *Walls Manufacturing Company, Inc.*, 137 NLRB 1317 (1962), enforced, 321 F. 2d 753, certiorari denied, 375 U.S. 923, where an employee wrote a letter to the Texas health department complaining of alleged unsanitary conditions in the employees' restrooms, which letter was inaccurate in several respects, such activity was held protected since the letter was not deliberately or maliciously false.

Except in cases so extreme that it cannot be argued that the language in question is protected, the determination must necessarily be left to the National Labor Relations Board which applies standards which are greatly different than the common law rules of defamation. The truth is, of course, important, but it has been held that when leaflets disparaging an employer's product are distributed to the public during a strike, the activity is not protected under the Act, whether or not the leaflets are truthful. *Patterson-Sargent Co.*, 115 NLRB 1627 (1956).

The Board has also stated on many occasions that:

> "Employees do not forfeit the protection of the Act if, in voicing their dissatisfaction with matters

> of common concern, they give currency to inaccurate information, provided it is not deliberately or maliciously false."
>
> *Walls Manufacturing Co., Inc.*, 137 NLRB 1317, 1319 (1962).

Such a position is apparently derived from the opinion of this Court in *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941), in which it was recognized that certain activities are motivated by "animal exuberance," rather than malice. And, the Board has applied the reasoning of this Court in *Cafeteria Employees Union v. Angelos*, 320 U.S. 293, 295, (1943) in which it was stated that words such as "unfair" and "fascist" were so much a part of economic controversies that to use them was "not to falsify facts" to hold the words "crook and liar" protected in certain circumstances. *Bettcher Manufacturing Corp., supra.*

In the present case, the statements were made during an organizing campaign having a representation election as its ultimate goal. The statements were clearly designed to gain support for the union and referred to the employers' manner of conducting labor relations. Petitioner is not specifically named in such statements which affect him solely in his capacity as a manager of the employer. And, as an admitted agent of the employer, he too is an "employer" as that term is defined in Section 2(2) of the Act.

If the statements are true, they are clearly protected. The complaint alleges no facts as to the circumstances of the publication which might fall within the unmalicious, misdirected enthusiasm category. Moreover, the Board might determine in view of all of the circumstances of the case that the language was no worse than the "crook and liar" language of the *Bettcher Mfg. Corp.* case, *supra.*

Whether or not the language complained of herein is "protected" or "prohibited" is for initial determination of the National Labor Relations Board. Certainly, the activity complained of is arguably protected by Section 7 of the Act.

II.

THE QUESTION PRESENTED IN THIS CASE IS CONTROLLED BY THE DOCTRINE OF PRE-EMPTION, AS STATED IN THE GARMON DECISION.

It is true that this Court has never ruled specifically on the precise question presented. However, the rule enunciated in *San Diego Building Trades Council v. Garmon, supra,* is sufficiently broad to cover the issue presented and the reasons for the preemption doctrine are equally valid with respect to the present case.

As was stated in *Garmon:*

> "When an activity is arguably subject to §7 or §8 of the Act, the State, as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." (p. 245)

> "To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed toward the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes." (p. 244)

The danger of possible conflict is obvious and particularly great in a situation, such as this, in which the activity which is in question is arguably protected by Section 7 of the Act. The Labor Board might find alleged defamatory statements protected and order reinstatement of an employee who had been discharged because of such statements. A State court jury might render an award for substantial damages against the same employee for the same statements found to be defamatory. The possible conflicts and potential danger are outlined extensively in the Brief for the United States as *Amicus Curiae*, pp. 24-36.

Certainly State regulation of defamation, which may be protected activity under the National Labor Relations Act, is the regulation of labor relations and a restriction upon rights guaranteed by the Act.

It is also important to note that long prior to the *Garmon* decision, this Court had held that States could not interfere with the exercise of rights protected by the National Labor Relations Act. *Hill v. Florida, supra.* This decision has been consistently followed and no exceptions have been engrafted on this rule.

The axiomatic nature of the rule prohibiting interference with rights guaranteed by the Act is illustrated by the concurring opinion in *Garmon.* It was there stated:

> "The Court's opinion in this case cuts deeply into the ability of States to furnish an effective remedy under their own laws for the redress of past nonviolent tortious conduct which is not federally protected, but which may be deemed to be, or is, federally prohibited." (p. 253)

Nevertheless, four Justices concurred with the majority on the ground that it was "fairly debatable", or arguable, that the conduct involved was protected.

For the foregoing reasons, respondents submit that the question presented in this case is controlled by the decision in *Garmon,* which, in part, expanded the long standing rule prohibiting state interference with federally granted and protected rights.

III.

NO EXCEPTION SHOULD BE MADE TO THE RULE OF GARMON TO PERMIT THE MAINTENANCE OF THIS CIVIL ACTION FOR LIBEL.

The *Garmon* case was concerned primarily with State regulation of activities prohibited under the National Labor Relations Act. However, this Court, in promulgating its preemption rule, incorporated those earlier cases which prohibited state interference with protected rights. The few exceptions to the preemption doctrine recognized in *Garmon* related to State court jurisdiction over activities *prohibited* by the Act.

The creation of an exception to the rule prohibiting interference with rights arguably guaranteed and protected by the Act would undermine the entire doctrine of preemption, which is based on Congressional intent to occupy a field and close it to State regulations. This is not a case in which there is merely a possibility of conflicting remedies for a prohibited act. In this case there may exist a right guaranteed by Congress which petitioner seeks to destroy by the application of state law. As was said in *Automobile Workers v. O'Brien,* 339 U. S. 454, (1949):

> "Clearly, we reaffirm the principle that 'if Congress has protected the union conduct which the State has forbidden * * * the state legislation must yield'." (page 459)

The purpose of the *Garmon* rule was to avert the danger of state interference with national policy. As was stated in *Garmon,* at page 246:

> "The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict, with national labor policy."

No one has disputed the soundness of the general rule or the validity of its purpose. The *sole* exception was founded on the compelling state interest in preserving domestic peace where there was actual violence or a threat of violence. Further exceptions based upon a tendency to violence or the nature of the injury suffered would not only increase the danger of interference with national labor policy, but might make the rule of *Garmon* so difficult to apply that it would become meaningless.

We submit that *Garmon* applies and squarely resolves the issue. There should be no retreat from its workable formula in the preemption area.

From *Hill v. Florida, supra,* in 1945 to *Garmon,* in 1959, was a long and weary way. The question as to the extent of federal preemption in the field of labor-management relations, and particularly the extent to which the original jurisdiction of the National Labor Relations Board is exclusive, sorely perplexed bench and bar. This question was certainly the subject of innumerable arguments and briefs in lower courts, both state and federal, in cases which were never appealed and therefore never reported. The search for a workable formulation by which bench and bar could be guided with reasonable certainty appears to have ended with *Garmon.*

Now to weaken the authority of that case on the dubious proposition that a defamatory statement made by a union protagonist concerning an employer, published in the heat of an organizing campaign, where the alleged defamatory statement itself relates to the employer's alleged conduct

in the area of labor relations, will cause a festering malcontent which would undermine peaceful labor relations, would be a regrettable retreat from certainty to doubt. The flood gates would open again to endless litigation over the respective areas of state and federal jurisdiction.

It is true that there will be cases, such as this, in which the remedies of an individual may be curtailed. That this would happen was also recognized in *Garmon* when it was stated at pages 246, 247:

> "Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventative relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme."

Not only is the exception requested in this case dangerous to the doctrine of pre-emption, it is unnecessary. Despite assertions of petitioner to the contrary, the precise language in this case, claimed to be defamatory, does not shock one's conscience when considered in the context of a union's organizing campaign, nor are any damages alleged. The same may be said with respect to most of the cases involving suits for defamation arising out of labor disputes and listed in Appendix B of the Brief for the United States. It would seem that a state would have a more "compelling" interest in protecting the employee's right to earn wages than to protect his employer from a charge of "liar" made in the course of a heated organizing campaign. Cf. *Local 100, United Ass'n of Journeymen and Apprentices v. Borden*, 373 U.S. 690 (1963).

There are, of course, cases in which the alleged defamation may be more serious and actual damages sustained. In the Brief of the United States, a suggestion is made whereby such cases could be made the subject of a civil action. However, the tests suggested are unworkable, for the so-called federal standards would be interpreted by the courts of fifty states in cases which, unlike suits under Section 301 of the Act, are not subject to review by this Court. Mere allegations of malice and characterizing the defamation as grave would be sufficient for a state court to assume and retain jurisdiction through trial. Whether there was malice and grave defamation would be for the determination of individual juries. There would be as many standards of malice and gravity as there were cases. The proposed exception would destroy the rule.

In the Brief for the United States, at page 45, it is suggested that State defamation actions should be confined to "grave defamations", such as accusations of having committed a felony, of sexual misconduct or of belonging to the Communist party. This, too, is unworkable. In *Grand Central Aircraft Co.*, 103 NLRB 1114 (1953), enforced (9th Cir. 1954) 216 F.2d 572, it was held that an employer's published pre-election propaganda which portrayed the union as communistic was protected free speech. Consider the possible conflict were a State court permitted to issue an injunction or award damages based on the same statement. See also *Rish Equipment Co.*, 150 NLRB No. 116 (1965) in which calling the union a "bunch of gangsters" was held an inconsequential incident.

Respondents suggest that the "arguably subject" test of *Garmon* is itself an answer to some of the more serious cases of defamation which would be clearly irrelevant to any protected concerted activity. The "arguably subject" test is a "relevance" test. Thus, the extreme examples posed in the Brief of the United States, if properly mea-

sured by the "arguably subject" test might support State court actions. What true relevance does a charge of homosexuality against a rival union leader bear on the ability of a union to effectively represent the employees? (Brief of the United States, p. 38.) Or, what relevance to an organizing campaign is a defamatory statement made about the brother of the Company's president who has no connection with the Company? (Brief of the United States, p. 38.)

The instant case, however, illustrates the normal name calling situation and the validity of the *Garmon* rule. The alleged defamatory material affected petitioner solely in his capacity as a manager of Pinkerton's National Detective Agency, Inc. and it was directly related to the union's organizing efforts. The National Labor Relations Board has investigated the matter and made a determination that these respondents were not responsible for the defamatory material. This determination was made after careful investigation by an administrative agency "armed with its own procedures, and equipped with its specialized knowledge and cumulative experience" (*San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 242 (1959)).

The problems between Pinkerton's and these respondents, arising out of the activities involved in this case have been resolved. If petitioner is permitted to maintain this action, the relations between his employer and these respondents would become more strained, thus hindering the national labor policy. If a jury were to find these respondents responsible for the defamatory material, the prestige and processes of the National Labor Relations Board would be seriously undermined.

Respondents submit that the pre-emption doctrine of *Garmon* should be applied to this case "if the danger of state interference with national policy is to be averted" and that there is no "compelling" reason to change this rule.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

HAROLD A. CRANEFIELD,
Counsel for Respondents United Plant Guard Workers of America Local 114, Benton I. Bilbrey and W. T. England,
2142 First National Building,
Detroit, Michigan 48226.

LIVINGSTON, GREGORY, VAN LOPIK & CRANEFIELD,
WINSTON L. LIVINGSTON,
NANCY JEAN VAN LOPIK,
Of Counsel.

Dated: October 8, 1965.

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. [illegible]

WILLIAM C. LEES,
Petitioner,

v.

UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 114, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

EMERGENCY MOTION FOR LEAVE TO APPEAR AMICI CURIAE, &c.

Russell E. Leander,
Baker, Hostetler & Patterson,
1956 Union Commerce Building,
Cleveland, Ohio,

Ralph Aronson,
352 East State Street,
Salem, Ohio,

Attorneys for Schnell Tool & Die Corporation and Salem Stamping & Manufacturing Company.

THE BYRD LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE 241-6272

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 45.

WILLIAM C. LINN,

Petitioner,

v.

UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 114, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

EMERGENCY MOTION FOR LEAVE TO APPEAR AMICI CURIAE, &c.

It has just been learned that, for financial reasons, no reply brief is being filed in this *Linn* case, and that the *Meyer* cases, Nos. 89 and 94, have been settled and are being dismissed under Rule 60. Further, the Supreme Court of Ohio is refusing to hear argument in *Schnell Tool et al.* v. *United Steelworkers et al.* until this Court decides this *Linn* case—despite the fact that the Court of Appeals' decision in *Linn* that defamation cases such as this fall within the ambit of *Garmon* rests, in the last analysis, on the *sole* authority of the Ohio *trial* court's opinions in *Schnell Tool,* 200 N. E. 2d 727 and 734.

Accordingly, Schnell Tool & Die Corporation and Salem Stamping & Manufacturing Company, being the plaintiffs-appellants in *Schnell Tool* (Case No. 39,319 in the Supreme Court of Ohio), who hereafter refer to them-

selves as "we", "us" and "our" for the sake of brevity, hereby respectfully and urgently move:

1. For leave to appear *amici curiae* in this *Linn* case and for leave to use as our *amici curiae* brief (a) these Motions and the reasons supporting them and (b) the respondents' "Motions, Request and Suggestions" in *Meyer*, October Term, 1965, Nos. 89 and 94, and the Appendix thereto annexed[1] (being our brief on the merits in *Schnell Tool* in the Supreme Court of Ohio), and

2. For leave to have one of our counsel, each of whom has argued orally here and each of whom is thoroughly steeped in the statutes pertinent here and their relevant legislative history, participate in oral argument—with sufficient time to do so meaningfully.

REASONS FOR MOTIONS

A. The questions in *Linn* are *not* adequately stated in *any* of the briefs in it—and the questions in *Linn* are almost *identical* with the questions in *Schnell Tool*.[1a] (Repeated meticulous searches of § 9(c) including § 9(c)(1) of the revised or "new"[2] National Labor Relations Act contained in § 101 of LMRA, 1947, 61 Stat. 136, 144, convince us there is nothing in § 9(c) that is pertinent here, and therefore nothing in it that introduces into *Linn* any question not also present in *Schnell Tool*. See page 18, note 17, and pp. 21-2 of Appendix to *Meyer* "Motions, Request and Suggestions.")

---

[1] The "Motions" etc. in *Meyer* have long since, on September 30, 1965, been served on *all* parties to this *Linn* case, as well as on the Solicitor General and on the NLRB.

[1a] For the questions actually present, see pp. 5 *et seq.* of Appendix to "Motions, Request and Suggestions" in *Meyer*.

[2] Senator Taft's characterization. See Appendix to Motions, Request and Suggestions in *Meyer*, p. 81.

B. What this means is that, *unless* we are allowed to appear *amici curiae* here, the questions that in truth exist both in this *Linn* case and in our *Schnell Tool* case might be effectively resolved *against* us when many of these questions have never been brought to this Court's attention, and when this Court has never had the benefit of an informed argument of them.

C. It is hard to exaggerate the importance of the questions that in truth exist in both *Linn* and *Schnell Tool*. If this Court finds it necessary, or desires, to reach *all* the questions that exist in said cases, then the whole matter of preemption or destruction of State remedies by the revised National Labor Relations Act is at stake, as well as grave constitutional questions that arise *unless* effect is given to the *expressed* intent of Congress—as it has *not* been in either *Linn* or *Schnell Tool* by the courts below.

Importance of Congressional Intent

D. As this Court has repeatedly *held*, in cases which, like this one, deal entirely with federal statutes, what one is exclusively concerned with is the *intent of Congress* as this intent emerges (1) from what the statutes say on their *face* and (2) from their *legislative history*. Indeed, in a case dealing with the very revised National Labor Relations Act with which we are here concerned, this Court has distilled its holding on this entire subject into this terse sentence: "The *purpose of Congress* is the *ultimate touchstone*." [3]

Yet, the brief of the respondents in *Linn* and the brief of the Solicitor General's office and the NLRB quote only isolated snatches from one or two of the pertinent statutes

---

[3] *Retail Clerks International Ass'n* v. *Schermerhorn* (1963), 375 U. S. 96, 103. (Emphasis supplied.)

and not one scintilla of the legislative history of any of them—which is perhaps understandable, since the pertinent statutes read in the light of their relevant legislative history are fatal to the arguments or "adumbrations" advanced in each brief.

Instead, said briefs argue *policy*. And the policy they argue is in *no* instance—except by occasional unwitting accident—the policy of *Congress*. The quite different policies each brief presses on this Court as desirable and asks this Court to promulgate as *law* are things spun by their respective authors *without reference* to the policy *clearly* expressed by *Congress* in said statutes and legislative history. In short, said briefs are beside the point.

We, to the contrary, in the Appendix of the respondents' "Motions, Request and Suggestions" in *Meyer*, quote the most pertinent statutory provisions *in full* and likewise quote their *relevant* legislative history. In short, we have assembled for the Court, in convenient form, the necessary tools for decision.

The Policy of Congress

The five page limitation imposed by Rule 42(3) allows only this *partial* summary of the policy of Congress:

1. As appears from § 1 of LMRA, 1947, perhaps the prime policy, purpose and intent of Congress in enacting it, including the revised National Labor Relations Act contained in its § 101, was to require "employers, employees, and labor organizations each [to] recognize *under law* one another's *legitimate rights* in their relations with each other". See pp. 41-2 of said Appendix. This is hardly consistent with any view that the revised Act licenses libel and slander.

2. When what is said on the *face* of § 7 is read in the light of its *legislative history*, it instantly becomes appar-

ent that § 7 *never* protects *unlawful* conduct, whether "concerted" or otherwise. See said Appendix, pp. 76-84. Thus, § 7 *never* protects libel or slander.

3. The only jurisdiction granted the NLRB by Congress which is pertinent here is its jurisdiction to prevent the "unfair labor practices" listed in § 8. See said Appendix, pp. 85-93. And § 8(c) expressly provides that *no* expression of "views" that contains no "promise of benefit" or "threat of reprisal or force", which the libels in this case did *not*, shall be an "unfair labor practice." *Ibid*, pp. 93-104. Thus, the revised Act expressly *strips* the NLRB of *all* jurisdiction over such libels and slanders as we have *here*. And this was deliberate, *ibid*.

CONCLUSION

For the several reasons stated, we respectfully ask that our motions be granted.

SCHNELL TOOL & DIE CORPORATION AND
SALEM STAMPING & MANUFACTURING
COMPANY, by
RUSSELL E. LEASURE,
RALPH ATKINSON AND
BAKER, HOSTETLER & PATTERSON,
their attorneys.

SUPREME COURT OF THE UNITED STATES

No. 45.—October Term, 1965.

William C. Linn, Petitioner, *v.* United Plant Guard Workers of America, Local 114, et al.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[February 21, 1966.]

Mr. Justice Clark delivered the opinion of the Court.

The case before us presents the question whether, and to what extent, the National Labor Relations Act, 61 Stat. 136, 29 U. S. C. § 141 (1964 ed.), bars the maintenance of a civil action for libel instituted under state law by an official of an employer subject to the Act, seeking damages for defamatory statements published during a union organizing campaign by the union and its officers. The District Court dismissed the complaint on the ground that the National Labor Relations Board had exclusive jurisdiction over the subject matter. It held that such conduct "would arguably constitute an unfair labor practice under Section 8 (b)" of the Act and that *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), compelled a dismissal on pre-emption grounds. The Court of Appeals affirmed, 337 F. 2d 68, assuming without deciding that the statements in question were "false, malicious, clearly libelous and damaging to plaintiff Linn, albeit they were relevant to the union's campaign." At p. 69. We granted certiorari, 381 U. S. 923. We conclude that where either party to a labor dispute circulates false and defamatory statements during a union organizing campaign, the court does have jurisdiction to apply state remedies if the complainant pleads and proves that the statements were made with malice and injured him. The judgment is, therefore, reversed.

I.

Petitioner Linn, an assistant general manager of Pinkerton's National Detective Agency, Inc., filed this suit against the respondent's union, two of its officers and a Pinkerton employee, Leo J. Doyle. The complaint alleged that, during a campaign to organize Pinkerton's employees in Detroit, the respondents had circulated among the employees leaflets which stated *inter alia:*

> "(7) Now we find out that Pinkerton's has had a large volume of work in Saginaw they have had it for years.
>
> "United Plant Guard Workers now has evidence.
>
> "A. That Pinkerton has 10 jobs in Saginaw, Michigan.
>
> "B. Employing 52 men.
>
> "C. Some of these jobs are 10 yrs. old!
>
> "(8) Making you feel kind sick & foolish.
>
> "(9) The men in Saginaw were deprived of their *right to vote* in three N. L. R. B. elections. Their names were not summitted [*sic*]. These guards were voted into the Union in 1959! These Pinkerton guards were *robbed* of pay increases. The Pinkerton manegers [*sic*] were *lying* to us—all the time the contract was in effect. No doubt the Saginaw men will file criminal charges. Somebody may go to Jail!"

The complaint further alleged that Linn was one of the managers referred to in the leaflet, and that the statements in the leaflet were "wholly false, defamatory and untrue" as respondents well knew. It did not allege any actual or special damage but prayed for the recovery of $1,000,000 on the ground that the accusations were libelous *per se.* Federal jurisdiction was based on diversity of citizenship.

All respondents, save Doyle, moved to dismiss, asserting that the subject matter was within the exclusive jurisdiction of the Board. The record indicates that prior to the institution of this action Pinkerton had filed unfair labor practice charges with the Regional Director of the Board, alleging that the distribution of the leaflets, as well as other written material, had restrained and coerced Pinkerton's employees in the exercise of their § 7 rights, in violation of § 8 (b)(1)(A) of the Act. The Regional Director refused to issue a complaint. Finding that the leaflets were circulated by Doyle, who was "not an officer or member of the charged union, nor was there any evidence that he was acting as an agent of the union," he concluded that the union was not responsible for the distribution of the leaflets and that the charge was, therefore, "wholly without basis." This ruling was sustained by the General Counsel of the Board some two months after this suit was filed.

In an unpublished opinion the District Judge dismissed the complaint holding, as we have already noted, that even if the union was responsible for distributing the material the case was controlled by *Garmon, supra.* The Court of Appeals affirmed, limiting its holding "to a suit for libelous statements growing out of and relevant to a union's campaign to organize employees of an employer subject to the National Labor Relations Act." At 72.

II.

The question before us has been a recurring one in both state and federal tribunals,[1] involving the extent to

[1] *E. g., Brantley* v. *Devereaux,* 237 F. Supp. 156 (D. C. E. D. S. C. 1965); *Meyer* v. *Joint Council 53, Int'l Bhd. of Teamsters,* 416 Pa. 401, 206 A. 2d 382. Petition for cert. dismissed under Rule 60, 382 U. S. 897 (1965). *Blum* v. *International Assn. of Machinists,* 42 N. J. 389, 201 A. 2d 46 (1964).

which the National Labor Relations Act, as amended, supersedes state law with respect to libels published during labor disputes. Its resolution entails accommodation of the federal interest in uniform regulation of labor relations with the traditional concern and responsibility of the State to protect its citizens against defamatory attacks. The problem is aggravated by the fact the law in many States presumes damages from the publication of certain statements characterized as actionable *per se*.[2] Labor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable *per se* in some state jurisdictions. Indeed, representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language. *California Union* v. *Angelos*, 320 U. S. 293, 295 (1943). It is therefore necessary to determine whether libel actions in such circumstances might transgress upon the national labor policy.

Our task is rendered more difficult by the failure of the Congress to furnish precise guidance in either the language of the Act or its legislative history.[3] As Mr.

---

[2] We adopt this terminology to avoid confusion with the concept of libel *per se*, applied in many States simply to designate words whose defamatory nature appears without consideration of extrinsic facts. Although Linn's complaint alleges that the leaflets were "libelous per se," his failure to specify the manner in which their publication harmed him indicates that he meant to rely on the presumption of damages. Under our present holding Linn must show that he was injured by the circulation of the statements; this necessarily includes proof that the words had a defamatory meaning.

[3] The Congress has declared in the Act that employees have the right to self-organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activ-

Justice Jackson said for a unanimous Court in *Garner* v. *Teamsters Union*, 346 U. S. 485, 488 (1953): "The . . . Act . . . leaves much to the states, though Congress has refrained from telling how much. We must spell out from conflicting indications of congressional will the area in which state action is permissible."

The Court has dealt with specific pre-emption problems arising under the National Labor Relations Act on many occasions, going back as far as *Allen-Bradley* v. *Wisconsin Employment Relations Board*, 315 U. S. 740 (1942). However, in framing the pre-emption question before us we need look primarily to *San Diego Trades Council* v. *Garmon*, 359 U. S. 236 (1959). There in most meticulous language this Court spelled out the "extent to which the variegated laws of the several States are displaced by a simple, uniform national rule . . . ." At 241. The Court emphasized that it was for the Board and the Congress to define the "precise and closely limited demarcations that can be adequately fashioned only by legislation and administration," while "[o]ur task is confined to dealing with classes of situations." At 242. In this respect, the Court concluded that the States need not yield jurisdiction "where the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . or where the regulated conduct touched interests so deeply rooted in local feeling and

---

ity for mutual aid and protection. § 7. In § 8 (a) Congress has made it an unfair labor practice for an employer to restrain or coerce employees in the exercise of § 7 rights. Likewise, § 8 (b) protects these rights against interference by a labor organization or its agents. And § 8 (c) provides that the expression of any views or opinions "shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." In addition, § 9 (c) (1) authorizes the Board, under certain conditions, to conduct representation elections and certify the results thereof. Finally, § 10 grants the Board exclusive power to enforce the prohibitions of the Act.

responsibility that, in the absence of compelling Congressional direction, we could not infer that Congress had deprived the States of the power to act." At 243–244. In short, as we said in *Plumbers Union* v. *Borden*, 373 U. S. 690, 693–694 (1963):

> "[I]n the absence of an overriding state interest such as that involved in the maintenance of domestic peace, state courts must defer to the exclusive competence of the National Labor Relations Board in cases in which the activity that is the subject matter of the litigation is arguably subject to the protections of § 7 or the prohibitions of § 8 of the National Labor Relations Act. This relinquishment of state jurisdiction . . . is essential 'if the danger of state interference with national policy is to be averted,' . . . and is as necessary in a suit for damages as in a suit seeking equitable relief. Thus the first inquiry, in any cases in which a claim of federal pre-emption is raised, must be whether the conduct called into question may reasonably be asserted to be subject to Labor Board cognizance."

We note that the Board has given frequent consideration to the type of statements circulated during labor controversies, and that it has allowed wide latitude to the competing parties.[4] It is clear that the Board does not "police or censor propaganda used in the elections it conducts, but rather leaves to the good sense of the voters the appraisal of such matters, and to opposing parties the task of correcting inaccurate and untruthful statements." *Stewart-Warner Corp.*, 102 N. L. R. B. 1153, 1158 (1953). It will set aside an election only where a material fact has been misrepresented in the representation campaign; opportunity for

[4] See Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act, 78 Harv. L. Rev. 38, 66 (1964).

reply has been lacking; and the misrepresentation has had an impact on the free choice of the employees participating in the election. *Hollywood Ceramics Co.*, 140 N. L. R. B. 221, 223–224 (1962); *F. H. Snow Canning Co.*, 119 N. L. R. B. 714, 717–718 (1957). Likewise, in a number of cases, the Board has concluded that epithets such as "scab," "unfair," and "liar" are commonplace in these struggles and not so indefensible as to remove them from the protection of § 7, even though the statements are erroneous and defame one of the parties to the dispute. Yet the Board indicated that its decisions would have been different had the statements been uttered with actual malice, "a deliberate intention to falsify" or "a malevolent desire to injure." *E. g.*, *Bettcher Mfg. Corp.*, 76 N. L. R. B. 526 (1948); *Atlantic Towing Co.*, 75 N. L. R. B. 1169, 1170–1173 (1948). In sum, although the Board tolerates intemperate, abusive and inaccurate statements made by the union during attempts to organize employees, it does not interpret the Act as giving either party license to injure the other intentionally by circulating defamatory or insulting material known to be false. See *Maryland Drydock Co.* v. *Labor Board*, 183 F. 2d 538 (1950). In such case the one issuing such material forfeits his protection under the Act. *Walls Manufacturing Co.*, 137 N. L. R. B. 1317, 1319 (1962).

In the light of these considerations it appears that the exercise of state jurisdiction here would be a "merely peripheral concern of the Labor Management Relations Act," provided it is limited to redressing libel issued with knowledge of its falsity, or with reckless disregard of whether it was true or false. Moreover, we believe that "an overriding state interest" in protecting its residents from malicious libels should be recognized in these circumstances. This conclusion is buttressed by our holding in *United Construction Workers* v. *Laburnum Con-*

struction Corp., 347 U. S. 656 (1952), where Mr. Justice Burton writing for the Court held:

> "To the extent . . . that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. The care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies was, itself, a recognition that if no conflict had existed, the state procedure would have survived." At 665.

In *United Automobile Workers* v. *Russell*, 356 U. S. 634 (1958), we again upheld state jurisdiction to entertain a compensatory and punitive damage action by an employee for malicious interference with his lawful occupation. In each of these cases the "type of conduct" involved, *i. e.*, "intimidation and threats of violence," affected such compelling state interests as to permit the exercise of state jurisdiction. *Garmon, supra,* at 248. We similarly conclude that a State's concern with redressing malicious libel is "so deeply rooted in local feeling and responsibility" that it fits within the exception specifically carved out by *Garmon*.

We acknowledge that the enactment of § 8 (c) manifests a congressional intent to encourage free debate on issues dividing labor and management.[5] And, as we

[5] The wording of the statute indicates, however, that § 8 (c) was not designed to serve this interest by immunizing all statements made in the course of a labor controversy. Rather, § 8 (c) provides that the "expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 61 Stat. 142 (1947), 29 U. S. C. § 158 (c) (1964 ed.). It is more likely that Congress adopted this section for a narrower purpose, *i. e.*, to prevent the Board from attributing anti-union

stated in another context, cases involving speech are to be considered "against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *New York Times* v. *Sullivan*, 376 U. S. 254, 270 (1964). Such considerations likewise weigh heavily here; the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth. But it must be emphasized that malicious libel enjoys no constitutional protection in any context. After all the labor movement has grown up and must assume ordinary responsibilities. The malicious utterance of defamatory statements in any form cannot be condoned, and unions should adopt procedures calculated to prevent such abuses.

III.

Nor should the fact that defamation arises during a labor dispute give the Board exclusive jurisdiction to remedy its consequences. The malicious publication of libelous statements does not in and of itself constitute an unfair labor practice. While the Board might find that an employer or union violated § 8 by deliberately making false statements, or that the issuance of malicious statements during an organizing campaign had such a profound effect on the election as to require that it be set aside, it looks only to the coercive or misleading nature of the statements rather than their defamatory quality. The injury that the statement might cause to an individual's reputation—whether he be an

---

motive to an employer on the basis of his past statements. See H. R. Rep. No. 510, 80th Cong., 1st Sess., 45 (1947). Comparison with the express protection given union members to criticize the management of their unions and the conduct of their officers, 73 Stat. 523 (1959), 29 U. S. C. § 411 (a)(2) (1964 ed.), strengthens this interpretation of congressional intent.

employer or union official—has no relevance to the Board's function. Cf. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, (1940). The Board can award no damages, impose no penalty, or give any other relief to the defamed individual.

On the contrary, state remedies have been designed to compensate the victim and enable him to vindicate his reputation. The Board's lack of concern with the "personal" injury caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for pre-emption.[6] As stressed by THE CHIEF JUSTICE in his dissenting opinion in *Russell, supra:*

> "The unprovoked infliction of personal injuries during a period of labor unrest is neither to be expected nor to be justified, but economic loss inevitably attends work stoppages. Furthermore, damages for personal injuries may be assessed without regard to the merits of the labor controversy . . . ." At 649.

Judicial condemnation of the alleged attack on Linn's character would reflect no judgment upon the objectives of the union. It would not interfere with the Board's jurisdiction over the merits of the labor controversy.

But it has been insisted that not only would the threat of state libel suits dampen the ardor of labor debate and truncate the free discussion envisioned by the Act, but that such suits might be used as weapons of economic coercion. Moreover, in view of the propensity of juries

---

[6] The fact that the Board has no authority to grant effective relief aggravates the State's concern since the refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the victim to take matters into his own hands. The function of libel suits in preventing violence has long been recognized. Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 933 (1956). But as to criminal libel suits see *Garrison* v. *Louisiana*, 379 U. S. 64 (1964).

to award excessive damages for defemation, the availability of libel actions may pose a threat to the stability of labor unions and smaller employers. In order that the recognition of legitimate state interests does not interfere with effective administration of national labor policy the possibility of such consequences must be minimized. We therefore limit the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage.

The standards enunciated in *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), are adopted by analogy, rather than under constitutional compulsion. We apply the malice test to effectuate the statutory design with respect to pre-emption. Construing the Act to permit recovery of damage in a state cause of action only for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false guards against abuse of libel actions, and unwarranted intrusion upon free discussion envisioned by the Act.

As we have pointed out, certain language characteristic of labor disputes may be held actionable *per se* in some state courts. These categories of libel have developed without specific reference to the labor controversies. However, even in those jurisdictions, the amount of damages which may be recovered depends upon evidence as to the severity of the resulting harm. This is a salutary principle. We therefore hold that a complainant may not recover except upon proof of such harm, which may include general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law. The fact that courts are generally not in close contact with the pressures of labor disputes makes it especially necessary that this rule be

followed. If the amount of damage awarded is excessive, it is the duty of the trial judge to require a remittitur or a new trial.[7] Likewise, the defamed party must establish that he has suffered some sort of compensable harm as a prerequisite to the recovery of additional punitive damages.[8]

Since the complaint here does not make the specific allegations that we find necessary in such actions, leave should be given Linn on remand to amend his complaint, if he so desires, to meet these requirements. In the event of a new trial he, of course, bears the burden of proof of such allegations.

IV.

Finally, it has been argued that permitting state action here would impinge upon national labor policy because the availability of a judicial remedy for malicious libel would cause employers and unions to spurn appropriate administrative sanctions for contemporaneous violations of the Act. We disagree. When the Board and state law frown upon the publication of malicious libel, albeit for different reasons, it may be expected that the injured party will request both administrative and judicial relief. The Board would not be ignored since its sanctions alone can adjust the equilibrium disturbed by an unfair labor practice. If a malicious libel contributed to union victory in a closely fought election, few employers would be

---

[7] The Government, as *amicus curiae*, has urged us to go further. It would limit liability to "grave" defamations—those which accuse the defamed person of having engaged in criminal, homosexual, treasonable, or other infamous conduct. We cannot agree. This would impose artificial characterizations that would encroach too heavily upon state jurisdiction.

[8] It should be noted that punitive damages were awarded in *Laburnum* and *Russell*. In both instances there was proof of compensatory injury resulting from the defendants' violence.

satisfied with simply damages for "personal" injury caused by the defamation. An unsuccessful union would also seek to set the election results aside as the fruits of an employer's malicious libel. And a union may be expected to request similar relief for defamatory statements which contribute to the victory of a competing union. Nor would the courts and the Board act at cross purposes since, as we have seen, their policies would not be inconsistent. Indeed, the alleged libel may not refer to either of the parties directly involved in the labor controversy, leaving no alternative to proceeding before the Board.

As was said in *Garrison* v. *Louisiana*, 379 U. S. 64, 75: "[T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social or political change is to be effected." We believe that under the rules laid down here it can be appropriately redressed without curtailment of state libel remedies beyond the actual needs of national labor policy. However, if experience shows that a more complete curtailment, even a total one, should be necessary to prevent impairment of that policy, the Court will be free to reconsider today's holding. We deal here not with a constitutional issue but solely with the degree to which state remedies have been pre-empted by the Act.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 45.—October Term, 1965.

William C. Linn, Petitioner, v. United Plant Guard Workers of America, Local 114, et al.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[February 21, 1966.]

Mr. Justice Black, dissenting.

The Court holds that an individual participant on the employer's side of a labor dispute can sue the union for libel on account of charges made by the union in the heat of the dispute. By the same token I assume that under the Court's holding, individual labor union members now have the right to sue their employers when they say naughty things during labor disputes. This new Court-made law tosses a monkey wrench into the collective bargaining machinery Congress set up to try to settle labor disputes, and at the same time exalts the law of libel to an even higher level of importance in the regulation of day-to-day life in this country.

When Congress passed the National Labor Relations Act, it must have known, as almost all people do, that in labor disputes both sides are masters of the arts of vilification, invective and exaggeration. In passing this law Congress indicated no purpose to try to purify the language of labor disputes or force the disputants to say nice things about one another. Nor do I believe Congress intended to leave participants free to sue one another for libel for insults they hurl at one another in the heat of battle. The object of the National Labor Relations Act was to bring about agreements by collective bargaining, not to add fuel to the fire by encouraging libel suits with their inevitable irritations and dispute-prolonging tendencies. Yet it is difficult to con-

ceive of an element more certain to create irritations guaranteed to prevent fruitful collective bargaining discussions than the threat or presence of a large monetary judgment gained in a libel suit generating anger and a desire for vengeance on the part of one or the other of the bargaining parties. I think, therefore, that libel suits are not only "arguably" but inevitably in conflict with the basic purpose of the Act to settle disputes peaceably—not to aggravate them, but to end them. For this reason I would affirm the judgment of the two lower courts.

Moreover, we held in *Thornhill* v. *Alabama*, 310 U. S. 88, 102, that "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." Discussion is not free, however, within the meaning of our First Amendment, if that discussion may be penalized by judgments for damages in libel actions. See the concurring opinions of MR. JUSTICE DOUGLAS and myself in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, and *Garrison* v. *Louisiana*, 379 U. S. 64, and my opinion in *Rosenblatt* v. *Baer*, — U. S. —. It is rather strange for this Court to import its novel ideas on libel suits into the area of labor controversies where the effect is bound to abridge the freedom of the parties to discuss their disputes and to settle them through peaceful negotiations. It is strange because one of the hopes of those responsible for modern collective bargaining was that peaceful settlements among the parties working by themselves under the aegis of federal law would be substituted for the old-time labor feuds too frequently accompanied by bitter strife and wasteful, dangerous conflicts verging on private war. Because libel suits in my judgment are inconsistent with both the Constitution of the United States and the policies of the Labor Act, I dissent from the holding of the Court reversing the judgment below.

SUPREME COURT OF THE UNITED STATES

No. 45.—October Term, 1965.

William C. Linn, Petitioner, v. United Plant Guard Workers of America, Local 114, et al.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[February 21, 1966.]

Mr. Justice Fortas, with whom The Chief Justice and Mr. Justice Douglas join, dissenting.

In my opinion, the Court's decision in the present case opens a major breach in the wall which has heretofore confined labor disputes to the area and weaponry defined by federal labor law, except where violence or intimidation is involved. By arming the disputants with the weapon of libel suits and the threat of punitive damages the Court jeopardizes the measure of stability painstakingly achieved in labor-management relations. It introduces a potentially disruptive device into the comprehensive structure created by Congress for resolving these disputes. In so doing, the Court not only sanctions an arrangement inconsistent with the intent of Congress, but, I think, departs from its own decisions narrowly limiting the occasions on which the disputants may, outside of the statutory framework, litigate issues arising in labor disputes.

In my judgment, the structure provided by Congress for the handling of labor-management controversies precludes any court from entertaining a libel suit between parties to a labor dispute or their agents where the allegedly defamatory statement is confined to matters which are part of the fabric of the dispute. The present controversy is just such a case.

Petitioner Linn is an officer of the employer sought to be organized by respondent union. The allegedly de-

famatory statements, set out in the opinion of the Court, relate to management conduct during the course of the dispute. The leaflets in question allegedly accuse management of lying both to the NLRB and to employees in order to deprive some employees of their right to vote in NLRB elections and to certain pay increases.

As an illustration of the kind of hyperbole characteristic of labor-management strife, this "libel" is hardly incendiary. To the experienced eye, it is pale and anemic when compared with the rich and colorful charges freely exchanged in the heat of many labor disputes.[1]

In response to such a pallid "libel," the Court today holds that petitioner, perceiving himself the target of a purportedly false and defamatory statement, may sue the union and several of its officers for damages—so long as he pleads that the statement is defamatory, was made with malice, and caused some injury to him. Should he succeed in clearing the hurdles thus set in his path, he may recover not only compensation for his "injuries," but punitive or exemplary damages as well. These requirements that petitioner plead and prove both malice and special damages—arising from what I regard as the Court's well-founded concern that libel suits might otherwise "pose a threat to the stability of labor unions and smaller employers"—may be cold comfort to the potential defendant in a libel suit. "Malice," which the Court defines as a deliberate intention to falsify or a malevolent desire to injure, is, after all, a largely subjective standard, responsive to the ingenuity of trial counsel and the predilections of judge and jury. And "injury" resulting from words is not limited to tangible trauma. These

[1] Compare, for example, the considerably more imaginative use of vituperation reflected in the allegedly defamatory statement in *United Steelworkers of America* v. *R. H. Bouligny, Inc.*, 382 U. S. 145. A description of the statement is found in Brief for Respondent, p. 2 (No. 19, O. T. 1965).

requirements afford dubious defense on a battlefield from which the qualified umpire—the NLRB—has been removed. In a libel suit, the outcome is determined by standards alien to the subject matter of labor relations, by considerations which do not take into account the complex and subtle values that are at stake, and by a jury unfamiliar with the quality of rhetoric customary in labor disputes. The outcome, in fact, is more apt to reflect immediate community attitudes toward unionization than appreciation for the underlying, long-term perplexities of the interplay of management and labor in a democratic society.

Until today, the decisions of this Court have consistently held that the federal structure for resolving labor disputes may not be breached or encumbered by state remedies where the tortious conduct allegedly involved is either protected or prohibited by federal labor legislation, or even "arguably subject to" federal law [2]—and despite the inability of the NLRB to redress the pecuniary harm suffered by the victim. In *Garner* v. *Teamsters Union*, 346 U. S. 485, the Court held that state courts may not enjoin peaceful picketing where plaintiff's grievance is within the jurisdiction of the NLRB. In *Guss* v. *Utah Labor Board*, 353 U. S. 1, the Court held that even where the NLRB declines to exercise its conceded jurisdiction over a labor dispute "affecting commerce," a parallel remedy before a state board is nonetheless pre-empted. And in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, the Court concluded that state courts may not award damages for peaceful picketing, although the conduct involved was only "arguably subject" to the federal statute and de-

[2] Suits to enforce collective bargaining agreements have been held to arise under 29 U. S. C. § 185 (a) and hence are not within the reach of the pre-emption doctrine. See *Smith* v. *Evening News Assn.*, 371 U. S. 195; Sovern, Section 301 and the Primary Jurisdiction of the NLRB, 76 Harv. L. Rev. 529 (1963).

spite the NLRB's decision not to exercise jurisdiction.[3] See also *Liner* v. *Jafco, Inc.*, 375 U. S. 301; *Plumbers' Union* v. *Borden*, 373 U. S. 690; *Local 438, Constr. Laborers* v. *Curry*, 371 U. S. 542. Today marks the first departure from what has become a well-established rule that only where the public's compelling interest in preventing violence or the threat of violence is involved can the exclusiveness of the federal structure for resolving labor disputes be breached. As we said in *Garmon*, 359 U. S., at 247: "Even the States' salutory effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme." The majority's opinion fails to make clear why the participant's interest in protecting his reputation from the sting of words uttered as part of a labor dispute is a compelling concern which this Court must allow the States to protect, while his interest in preserving his economic well-being from illegal picketing is not.

By narrowly restricting the permissible exceptions to the general rule of pre-emption and by excluding generally the right to compensation for purely private wrongs, the Court has contributed to the Nation's success in domesticating the potentially explosive warfare between labor and management. The decision announced today threatens the degree of equilibrium which has been achieved. I think that the Court's decision both underestimates the damage libel suits may inflict on the equilibrium, and overestimates the effectiveness of the restraint which will result from superimposed requirements of malice and special damages.

[3] Subsequent to *Garmon* and *Guss*, Congress has explicitly removed the obstacles to state-court treatment of labor disputes as to which the NLRB has declined to exercise jurisdiction on the ground of insufficient effect on interstate commerce. 29 U. S. C. § 164 (c)(2) (1964 ed.).

I find support for my view in the evidence as to the intent of Congress. As the majority concedes, Congress has in unmistakable terms recognized the importance of labor-management dialogue untrammelled by fear of retribution for strong utterances. It has manifested awareness that lusty speech provides a useful safety valve for the tensions which often accompany these controversies. For example, Congress has provided that an unfair labor practice charge may not be based on the "expression of any views, argument, or opinion . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U. S. C. § 158 (c).[4] And one of its statutes, 29 U. S. C. § 411 (a)(2), has been construed to prevent unions from disciplining members who utter defamatory statements during the course of internal union disputes. *Salzhandler* v. *Caputo*, 316 F. 2d 445 (C. A. 2d Cir.), cert. denied, 375 U. S. 945; *Cole* v. *Hall*, 339 F. 2d 881 (C. A. 2d Cir.); *Stark* v. *Twin City Carpenters Dist. Council*, 219 F. Supp. 528 (D. C. D. Minn.). Where Congress wishes to create an exception to the general rule of exclusive NLRB jurisdiction, it does so explicitly. See 29 U. S. C. § 187 (1964 ed.), authorizing suits for damages arising out of violations of 29 U. S. C. § 158, and 29 U. S. C. § 164, authorizing judicial remedies where the NLRB declines to assert jurisdiction under 29 U. S. C. § 151.

The foregoing considerations do not apply to the extent that the use of verbal weapons during labor disputes is not confined to any issue in the dispute, or involves a person who is neither party to nor agent of a party to

[4] Although libelous statements cannot serve as the predicate for an unfair labor practice charge, like any other misleading statement they may in certain circumstances induce the NLRB to set aside the results of an election. See Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act, 78 Harv. L. Rev. 38, 82–84 (1964).

the dispute. In such instances, perhaps the courts ought to be free to redress whatever private wrong has been suffered. But this is not such a case. The fact that the Court today rules that, after appropriate amendment of the complaint, a libel action may be maintained on the basis of the circumscribed accusation contained in the leaflet in question demonstrates how very substantial is the breach opened in the wall which has heretofore insulated labor disputes from the vagaries of lawsuits.[5] I would affirm the decision below.

[5] Resort to libel suits as an auxiliary weapon in resolving labor disputes presents much more than an abstract threat. For evidence of a growing tendency to invoke these suits see the list of such cases recently pending in the Fourth Circuit alone in Brief for Petitioner, p. 15, *United Steelworkers of America* v. *R. H. Bouligny, Inc.*, *supra*; and those listed in Brief for Amicus Curiae in the present case, pp. 18–39.